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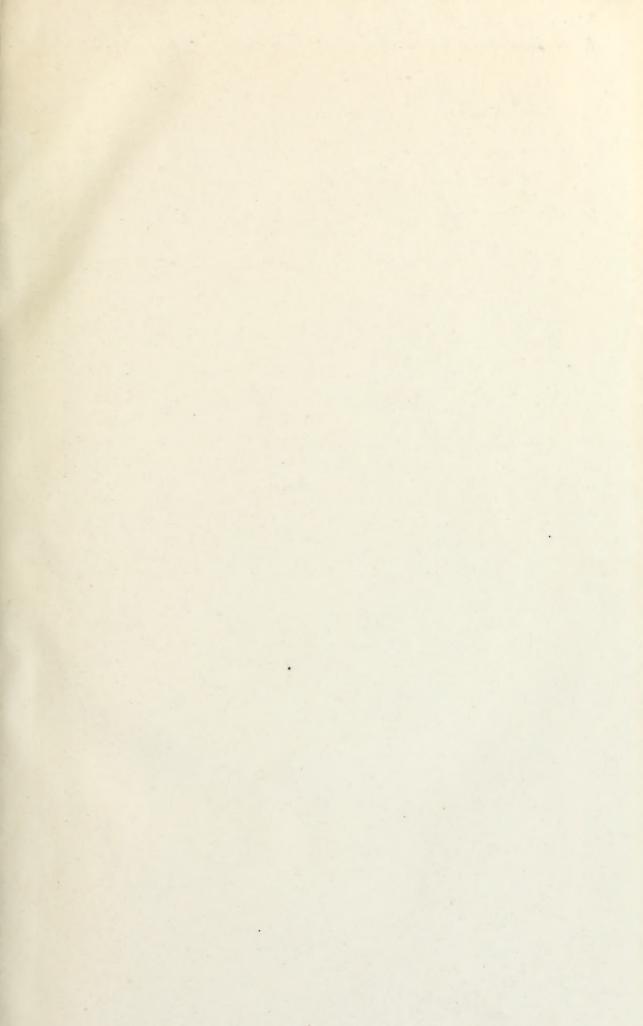
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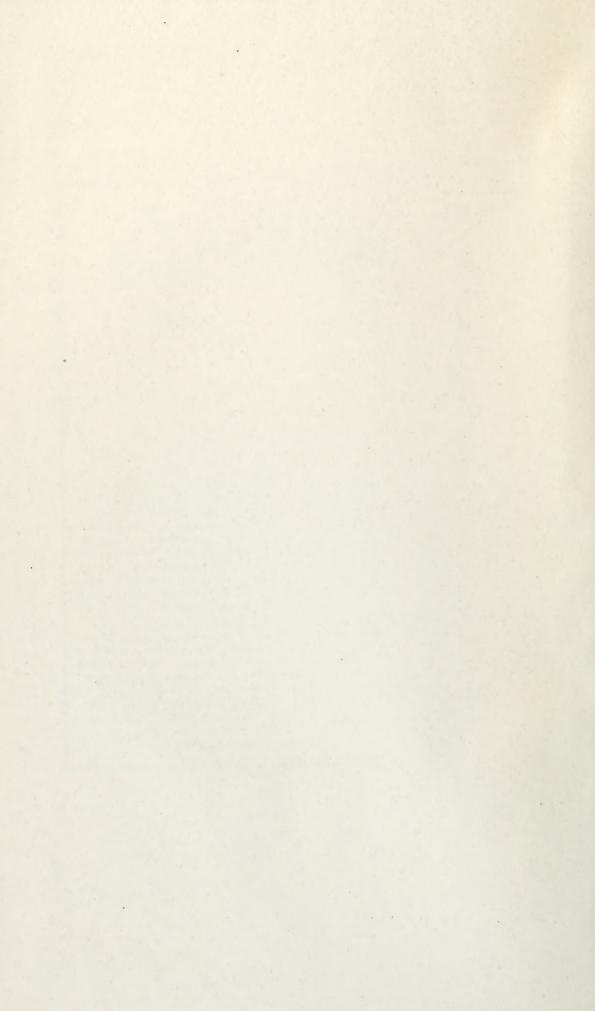
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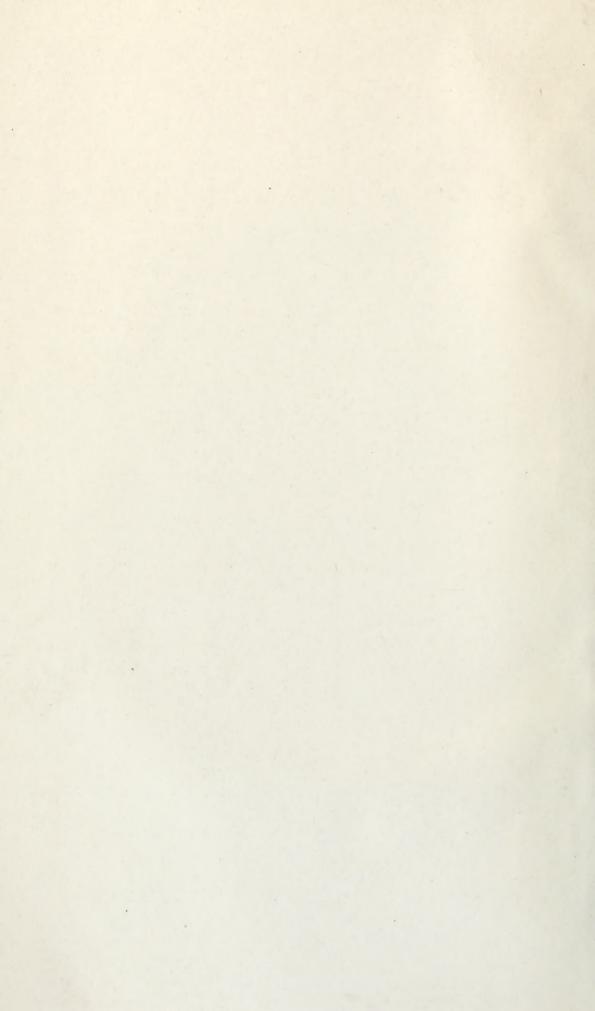
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United States

Circuit Court of Appeals

For the Ninth Circuit.

ONG SEEN, Alias ONG CHONG LUNG,
Appellant,

VS.

ALFRED E. BURNETT, Inspector in Charge, United States Immigration Office at Tucson, Arizona,

Appellee.

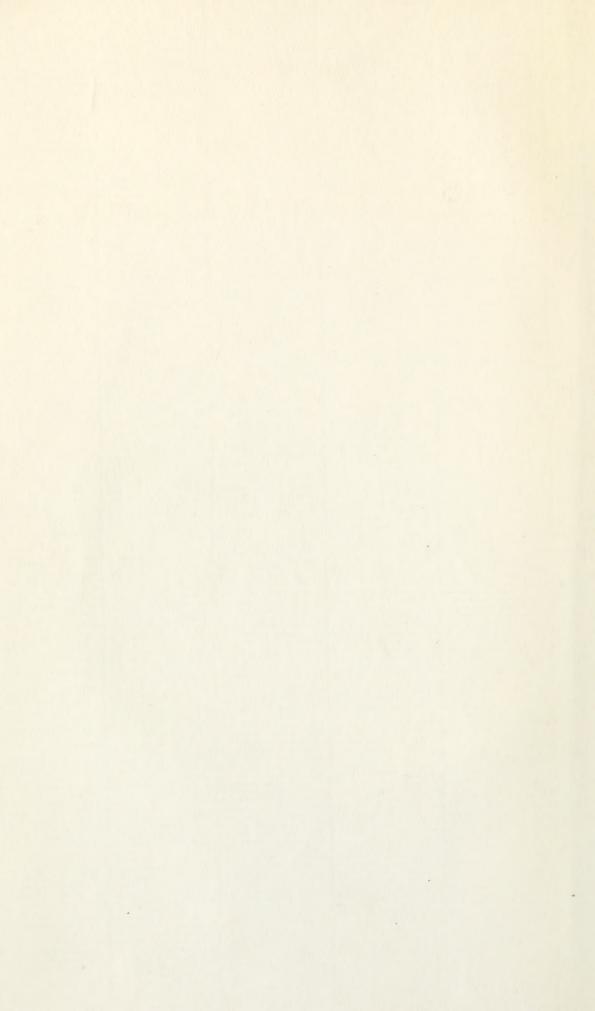
Transcript of Kecord.

Upon Appeal from the United States District Court for the District of Arizona.

Filed

FEB 1 6 1916

F. D. Menckton,



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Transcript of Kecord.

Upon Appeal from the United States District Court for the District of Arizona.



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[Clerk's Note: When deemed likely to be of an important nature,

errors or doubtful matters appearing in the original certified record printed literally in italic; and, likewise, cancelled matter appearing the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated printing in italic the two words between which the omission sto occur. Title heads inserted by the Clerk are enclosed with brackets.]	g in cord- l by eems
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[Names and Addresses of] Counsel.

Counsel for Appellant:

STRUCKMEYER & JENCKES, Phoenix, Arizona.

Counsel for Appellees:

THOMAS A. FLYNN, United States Attorney, Phoenix, Arizona.

In the United States District Court in and for the District of Arizona.

ONG SEEN, alias ONG CHONG LUNG,
Complainant,

VS.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office at Tucson, Arizona.

Petition for Writ of Habeas Corpus.

To the Honorable WILLIAM H. SAWTELLE, Judge of the United States District Court in and for the District of Arizona:

The complainant Ong Seen, also known as Ong Chong Lung, respectfully shows unto your Honor that he is now imprisoned, confined and restrained of his liberty by Alfred E. Burnett, Inspector in Charge United States Immigration office at Tucson, Arizona, and that such imprisonment, restraint and confinement is illegal and in violation of the Constitution of the United States and in violation of the laws and treaties of the United States, and is deprived of his liberty without due process of law, and

more particularly the complainant alleges:

That he is a person of Chinese descent born in the Empire, now Republic, of China, and that heretofore on, to wit, the 7th day of April, 1906, the complainant came to the United States and was by the proper authorities of the United States permitted to enter the United States as a merchant, and ever since said time has resided in the United States, except that thereafter, on, to wit, January 23d, 1912, the complainant, with the intention of returning to the United States, returned to China for a temporary visit, and thereafter on the 4th day of February, 1913, returned to the United States and was by the proper authorities of the United States permitted to enter the United States at the Port of San Francisco, State of California, as a merchant lawfully domiciled in the United States and having the power to return thereto and remain in the United States.

That heretofore on, to wit, the 16th day of April, 1914, the Secretary of Labor of the United States issued a departmental warrant for the arrest of the complainant as a person unlawfully in the United States, and thereafter ordered the complainant deported from the United States into the Republic of China as a person unlawfully in the United States, and that the complainant is now about to be deported from the United States, and by virtue of said warrant of arrest and order of deportation the complainant is confined and restrained of his liberty by the defendant.

That the complainant ever since his first entry into the United States has been a merchant lawfully

residing in the United States and was on the 4th day of February, 1913, a merchant lawfully entitled to enter into the United States and remain therein, he, the said complainant, being a member of the Doap Leun Hong Company of San Francisco, California, which said company is a bona fide mercantile company engaged in trading in the United States within the sense and meaning of the laws of the United States relating to the admission and exclusion of aliens, and the interest therein of the complainant is a bona fide interest, and the complainant a merchant within the meaning of the laws of the United States relating to the admission and exclusion of aliens, which said facts were submitted to and received in evidence by the Department of Labor, and upon said facts as disclosed by said evidence the Secretary of Labor erroneously held that the complainant was illegally in the United States, and upon said evidence ordered that he be deported thence into the Republic of China, which said evidence was uncontradicted and uncontroverted by the United States and was the only evidence submitted to and received by the said Secretary of Labor, and on which his order of deportation was based, and that therefore the restraint and confinement of your petitioner is illegal.

That the arrest of the complainant under the order of the Secretary of Labor heretofore referred to and his confinement and imprisonment is further illegal and without authority of law in that the complainant having lawfully entered the United States, the said Secretary of Labor was without jurisdiction and authority to order his arrest and deportation.

The complainant further alleges that he is unable to attach to this petition a complete record of the evidence submitted to said Secretary of Labor, for the reason that a complete record is not in his possession but in the possession of the said defendant.

WHEREFORE the complainant prays that a writ of habeas corpus be granted to him directed to the said Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona, requiring the said defendant to certify to your Honor the true cause of detention of the complainant, and to bring the body of the complainant before your Honor, and to then and there abide by and do and perform the order the judgment of this Court.

ONG SEEN.

STRUCKMEYER & JENCKES, Attys. for Complt.

State of Arizona,
County of Pima,—ss.

Ong Seen, also known as Ong Chong Lung, being first duly sworn, upon oath, deposes and says that he is the complainant in the foregoing complaint by him subscribed; that he has read the same and knows the contents thereof and the same is true in substance and fact.

ONG SEEN.

Subscribed and sworn to before me this 22d day of June, 1914.

My commission expires ——. [Seal U. S. Commissioner.]

EDWIN F. JONES, U. S. Commissioner. [Endorsement]: No. C-66-Tucson. In the United States District Court, in and for the District of Arizona. Ong Seen, also Known as Ong Chong Lung, Complainant, vs. Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona. Petition for Writ of Habeas Corpus. Filed June 22, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Struckmeyer & Jenckes, Attorneys for Complainant.

In the United States District Court in and for the District of Arizona.

In the Matter of the Application of ONG SEEN, alias ONG CHONG LUNG, for a Writ of Habeas Corpus.

Order for Writ of Habeas Corpus.

Upon reading the complaint and petition for a writ of habeas corpus filed herein, from which it appears to me that a writ of habeas corpus ought to issue as prayed for, it is ordered that a writ of habeas corpus issue out of and under the seal of this court directed to Alfred E. Burnett, Inspector in Charge of the United States Immigration office at Tucson, Arizona, commanding him to have the body of the petitioner before me in the courtroom of the said court on the 25th day of June, 1914, at ten o'clock A. M., on that day, and then and there to certify to this court the true cause of the detention of petitioner, and then and there abide by do and perform the order and judgment of this court.

IT IS THEREFORE ORDERED that the peti-

tioner, pending the hearing of this case, be admitted to bail in the sum of one thousand dollars, to be approved by the clerk.

Dated June 22d, 1914.

WM. H. SAWTELLE,

Judge of the United States District Court in and for the District of Arizona.

[Endorsements]: No. C-66 (Tucson). In the United States District Court. In the Matter of the Application of Ong Seen, alias Ong Chong Lung, for a Writ of Habeas Corpus. Order for Writ of Habeas Corpus. Filed June 22, A. D. 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

[Writ of Habeas Corpus.]

- In the United States District Court in and for the District of Arizona.
- In the Matter of the Application of ONG SEEN, alias ONG CHONG LUNG, for a Writ of Habeas Corpus.
- The President of the United State to Alfred E. Burnett, Inspector in Charge of the United States Immigration Office at Tucson, Arizona, Greeting:

We command you that you have the body of Ong Seen, alias Ong Chong Lung, by you imprisoned and detained, as it is said, together with the time of imprisonment and cause of said imprisonment and detention by whatsoever name he shall be called or charged, before the Honorable William H. Sawtelle, Judge of said court, at the courtroom of said court-

house in the city of Tucson, within the District of Arizona, on the 25th day of June, A. D. 1914, at the hour of ten o'clock A. M., and that he do and receive what shall then and there be construed concerning the said Ong Seen, alias Ong Chong Lung, and to then and there abide by, and to do and perform the order and judgment of said court and to have you then and there this writ.

WITNESS the Honorable WILLIAM H. SAW-TELLE, Judge of the District Court of the United States in the District of Arizona, this 22d day of June, 1914.

Attest my hand and the seal of said court the day and year last above written.

GEORGE W. LEWIS,

Clerk of said Court.

By Effie D. Botts,

Deputy Clerk.

[Endorsement]: No. C-66 (Tucson. In the United States District Court. In the Matter of the Application of Ong Seen alias Ong Chong Lung, for a Writ of Habeas Corpus. Marshals Docket No. 409. Received this writ June 23d, at 2 P. M. Served same June 23d, at 4 P. M., by leaving copy with Alfred E. Burnett. J. P. Dillon, U. S. Marshal A. W. Forbes, Dept. Filed June 25, A. D. 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

In the United States District Court in and for the District of Arizona.

ONG SEEN, alias ONG CHONG LUNG,

Complainant,

VS.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office at Tucson, Arizona.

Demurrer.

And now comes the petitioner, by Struckmeyer and Jenckes, his attorneys, and demurs to the return of the respondent Alfred E. Burnett, Inspector in Charge United States Immigration office at Tucson, Arizona, made herein and for ground of demurrer shows.

I.

That the facts stated in said return do not justify the detention of the petitioner by the said respondent and do not justify the deportation by the respondent and by the Secretary of Commerce and Labor of the petitioner to the Republic of China.

II.

That the facts stated in the return are not sufficient to constitute a defense to the petition for a writ of habeas corpus filed herein, and are not sufficient to show cause why the petitioner should not be discharged from the detention by the despondent.

III.

That the return shows that the respondent and the Secretary of Commerce and Labor did not accord to the petitioner a fair hearing, in that they arbitrarily found the petitioner to be unlawfully in this country in violation of law without any evidence whatsoever having been introduced justifying such finding.

IV.

That the return shows that the detention by the respondent of the petitioner and the order of the Secretary of Commerce and Labor in ordering the petitioner deported is and was without jurisdiction.

WHEREFORE the petitioner demurs to the sufficiency of said return, and prays that he may be discharged from further detention as he has already prayed.

STRUCKMEYER & JENCKES,

Attorneys for the Petitioner.

I, F. C. Struckmeyer, one of the attorneys for the petitioner herein, do hereby certify that in my opinion the foregoing demurrer is well taken in point of law, and I do further certify that the same is not interposed for the purpose of delay.

F. C. STRUCKMEYER.

[Endorsements]: No. C-66-Tucson. In the United States District Court, in and for the District of Arizona. Ong Seen, alias Ong Chong Lung, vs. Alfred E. Burnett, Inspector in Charge, etc. Demurrer. Filed Aug. 26, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

[Order Remanding Applicant into Custody.]

In the United States District Court for the District of Arizona.

C-66-TUCSON.

In the Matter of the Application of ONG SEEN, alias ONG CHONG LUNG, for Writ of Habeas Corpus.

The above-entitled matter coming on regularly for decision this 27th day of September, 1915, at the United States District Court room at Tucson, Arizona, at ten o'clock in the forenoon of that day; the applicant appearing in person and by Struckmeyer & Jenckes, his counsel, and Samuel L. Pattee, Esq., Assistant United States of America, and it appearing to the Court that the applicant filed in his petition for a writ of habeas corpus, claiming that he is illegally confined and restrained of his liberty by Alfred E. Burnett, Inspector in Charge of the Department of Immigration and Labor at Tucson, Arizona, and asking that a writ of habeas corpus be issued requiring that he be brought before this Court and that he be discharged; and thereafter a writ of habeas corpus was issued in accordance with the prayer of said petition and a return was thereafter duly made to said writ and demurrer to said return filed with said Court, and documentary evidence was produced before the Court, and same was heretofore argued and submitted to the Court for its decision and the Court

finds, after due deliberation, that the applicant is not entitled to the relief prayed for in his petition and that he be, and hereby is, remanded into the custody of Alfred E. Burnett, Inspector in Charge of the Department of Immigration and Labor, at Tucson, Arizona, to abide by the rules and regulations of that department.

[Endorsements]: C-66-Tucson. In the United States District Court for the District of Arizona. In the matter of the application of Ong Seen, alias Ong Chong Lung, for Writ of Habeas Corpus. Order overruling Demurrer. Filed September 27th, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy.

In the District Court of the United States, in and for the District of Arizona.

ONG SEEN, also Known as ONG CHUNG LUNG, Complainant,

VS.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office, at Tucson, Arizona,

Petition for Leave to Appeal.

Comes now the complainant, Ong Seen, also known as Ong Chung Lung, and respectfully petitions the Court for an order to be entered herein, allowing his appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order and judgment of this Court overruling his demurrer to

the return of respondent to the writ of habeas corpus heretofore issued herein, and discharging the said writ of habeas corpus, and remanding the complainant to the custody of respondent.

Complainant further petitions this Court for an order to be entered herein admitting petitioner to bail pending his appeal to the Circuit Court of the United States for the Ninth Circuit.

STRUCKMEYER & JENCKES,
Attorneys for Complainant.

In the District Court of the United States, in and for the District of Arizona.

ONG SEEN, also Known as ONG CHUNG LUNG, Complainant,

VS.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office, at Tucson, Arizona,

Respondent.

Assignment of Errors.

Complainant, Ong Seen, also known as Ong Chung Lung, for his assignment of errors herein, alleges as follows:

I.

That the Court erred in overruling complainant's demurrer to the return filed herein by respondent to the writ of habeas corpus, based on the ground that the facts stated in said return do not justify the detention of complainant by respondent and do not justify the deportation of complainant to the

Republic of China by respondent and by the Secretary of Labor.

II.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the facts stated in said return are not sufficient to constitute a defense to the petition for a writ of habeas corpus filed herein, and are not sufficient to show cause why complainant should not be discharged from the detention by the respondent.

III.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the respondent and the Secretary of Labor did not accord to complainant a fair hearing in that they arbitrarily found complainant to be unlawfully in this country in violation of law without any evidence whatsoever having been introduced justifying such finding.

IV.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the detention by the repondent of the petitioner and the order of the Secretary of Labor in ordering the petitioner deported is and was without jurisdiction.

V.

That the Court erred in denying the application of complainant for his discharge under the writ of habeas corpus, in discharging said writ, and in remanding complainant to the custody of respondent.

STRUCKMEYER & JENCKES,

Attorneys for Complainant.

[Endorsements]: C-66-Tucson. In the District Court of the United States for the District of Arizona. Ong Seen, also Known as Ong Chung Lung, Complainant, vs. Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona, Respondent. Petition for Leave to Appeal. Filed September 28, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Struckmeyer & Jenckes, Attorneys for Complainant.

[Order Granting Appeal and Admitting Petitioner to Bail Pending Appeal.]

In the United States District Court for the District of Arizona.

C-66.

In the Matter of the Application of ONG SEEN, alias ONG CHONG LUNG, for Writ of Habeas Corpus.

MINUTE ENTRY MADE ON SEPTEMBER 28th, 1915.

The petitioner having filed in this court his petition for leave to appeal to the Circuit Court of Appeals for the Ninth Circuit from the order and judgment of this court, overruling his demurrer to the return and reply to the writ of habeas corpus heretofore issued herein and denying the said writ of habeas corpus and remanding the petitioner to the custody of the marshal, and further praying for an order admitting the petitioner to bail pending his appeal to the Circuit Court of Appeals for the Ninth Circuit, it is ordered that the said appeal be and

the same is hereby granted, and that the petitioner may be admitted to bail pending his appeal to the said Circuit Court of Appeals for the Ninth Circuit, upon his executing bond with two or more good and sufficient sureties thereon, in penalty of three thousand dollars (\$3.000), to be approved by the clerk of this court, conditioned according to law and to be filed with the papers herein.

[Bond on Appeal.]

KNOW ALL MEN BY THESE PRESENTS: That Ong Seen, as principal, and Leo Goldman and Win Wylie, as sureties, are held and firmly bound unto the United States of America in the sum of three thousand dollars, lawful money of the United States, for which payment, well and truly to be made to the United States of America, we bind ourselves, our heirs, executors and administrators, firmly by these presents:

The condition of the above obligation is such that whereas heretofore on, to wit, the 22d day of June, A. D. 1914, the United States District Court for the District of Arizona, in an action then pending in said court wherein the above-bounden obligor, Ong Seen, is petitioner and Alfred E. Burnett, Inspector in Charge United States Immigration office at Tucson, Arizona, is defendant, entered an order and judgment awarding to said petitioner a writ of habeas corpus, and

Whereas on the 27th day of September, 1915, after a hearing upon the return of said defendant Alfred E. Burnett to said writ of habeas corpus the said United States District Court for the District of Arizona entered its order and judgment discharging said writ of habeas corpus and remanding the said petitioner Ong Seen to the custody of the said defendant, Alfred E. Burnett, for deportation to the Republic of China, and

Whereas the petitioner Ong Seen has appealed from said order and the judgment of the United States District Court for the District of Arizona to the United States Circuit Court of Appeals for the Ninth Circuit, which said appeal has been allowed by said United States District Court for the District of Arizona by an order entered in said proceedings, and

Whereas the said United States District Court for the District of Arizona has by order entered in said proceedings admitted the petitioner Ong Seen to bail pending his said appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the sum of three thousand dollars.

Now, therefore, if the said above-bounden obligor Ong Seen, shall be and appear before the United States District Court for the District of Arizona, at such time as said Court may designate, to answer the judgment of said Circuit Court of Appeals, that may be rendered against him in said proceeding, and surrender himself in execution thereof, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this 29th day of September A. D. 1915.

ONG SEEN. (Seal)

WIN. WYLIE. (Seal)

LEO. GOLDMAN. (Seal)

United States of America, State of Arizona, County of Maricopa,—ss.

Leo. Goldman and Win Wylie, the sureties in the foregoing undertaking, being first duly sworn, upon oath, each for himself and not one for the other, says that he is worth the sum of three thousand dollars (\$3,000), over and above all his just debts and liabilities and over and above all property exempt by law from execution and forced sale, and that is is a resident and freeholder within the State of Arizona.

LEO. GOLDMAN. WIN WYLIE.

Subscribed and sworn to before me this 30th day of September, A. D. 1915.

JOSEPH S. JENCKES.

Notary Public.

(My commission expires Feb. 16, 1916.)

Approved:

Clerk.

O. K. as to form.

Attest: S. L. PATTEE, United States Attorney.

[Endorsements]: C-66-Tucson. In the United States District Court for the District of Arizona.

In the Matter of the Application of Ong Seen for Writ of Habeas Corpus. Bond on Appeal. Approved and Filed this 1st Day of October, A. D. 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy.

In the United States District Court for the District of Arizona.

ONG SEEN, alias ONG CHONG LUNG,
Petitioner,

VS.

ALFRED E. BURNETT,

Respondent.

Order [Enlarging Time to November 24, 1915, to File Record on Appeal, etc.].

This matter being presented to me upon the motion of the petitioner by Struckmeyer and Jenckes, his attorneys, for an order enlarging the time within which the petitioner may file the record and docket the cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to me that the time for filing said record and docketing said cause, to wit, thirty days from the 28th day of September, 1915, has not expired, and good cause being shown to me therefor and no objection being made by the respondent,

IT IS ORDERED that the time within which the petitioner may file the record on appeal herein and docket the cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended to

and including the 24th day of November, 1915.

Dated Phoenix, Arizona, October, 27th, 1915.

WM. H. SAWTELLE,

Judge.

[Endorsement]: No. C-66-Tucson. In the United States District Court for the District of Arizona. Ong Seen, alias Ong Chong Lung, Petitioner, vs. Alfred E. Burnett, Respondent. Order. Filed Oct. 27, 1915. George W. Lewis, Clerk.

In the United States District Court for the District of Arizona.

ONG SEEN, alias ONG CHONG LUNG,
Petitioner,

VS.

ALFRED E. BURNETT,

Respondent.

Stipulation [that Original Return, etc., may be Sent to U. S. Circuit Court of Appeals].

It is hereby stipulated by and between Struckmeyer and Jenckes, attorneys for the petitioner, and
Thomas A. Flynn, United States Attorney for the
District of Arizona, representing the respondent
herein, that the original of the return to the writ
of habeas corpus, together with all exhibits attached
thereto, may be sent up to the Circuit Court of Appeals upon the appeal herein in lieu of a copy thereof; this stipulation being made for the reason that
such return contains certain exhibits of photographs
and documents written in the Chinese language, of

which it is impracticable to make copies.

STRUCKMEYER & JENCKES,

Attorneys for Petitioner.

THOMAS A. FLYNN,

Attorney for Respondent.

[Endorsements]: No. C-66-Tucson. In the United States District Court in and for the District of Arizona. Ong Seen, alias Ong Chong Lung, Petitioner, vs. Alfred E. Burnett, Respondent. Stipulation. Filed Dec. 17, A. D. 1915, at 11 A. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

In the United States District Court for the District of Arizona.

ONG SEEN, alias ONG CHONG LUNG,
Petitioner,

VS.

ALFRED E. BURNETT,

Respondent.

Praecipe [for Transcript of Record].

To George W. Lewis, Clerk United States District Court for the District of Arizona.

You are hereby requested to include d in the transcript of the record in the above-entitled matter the following papers:

- 1. Petition for Writ of Habeas Corpus;
- 2. Order for Writ of Habeas Corpus;
- 3. Writ of Habeas Corpus;
- 4. The Return to the Writ of Habeas Corpus .(Original to be sent up);
- 5. Petitioner's Demurrer to the Return;

- 6. Order Overruling Petitioner's Demurrer Refusing to Discharge Petitioner, etc.;
- 7. The Petition for Leave to Appeal, etc.;
- 8. Order Granting Leave to Appeal and Fixing Bond;
- 9. Bond on Appeal;
- 10. Citation (Original to be sent up);
- 11. Stipulation;
- 12. This Praecipe.

STRUCKMEYER & JENCKES, Attorneys for Petitioner.

[Endorsements]: No. C-66-Tucson. In the United States District Court in and for the District of Arizona. Ong Seen, alias Ong Chong Lung, Petitioner, vs. Alfred E. Burnett, Respondent. Praecipe. Filed Dec. 16, A. D. 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the United States District Court for the District of Arizona.

No. C-66—TUCSON.

ONG SEEN, alias ONG CHONG LUNG,
Appellant,

rippor

VS.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office, at Tucson, Arizona,

Appellee.

United States of America, District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, number 1 to 22, inclusive, constitute and are a true, complete and correct copy of the record, pleadings and proceedings had in the case of Ong Seen, alias Ong Chong Lung, Appellant, vs. Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona, Appellee, No. C-66-Tucson, as the same is called for in the praecipe, a copy of which is made a part of this transcript, as the same remain on file and of record in said District Court, and I also annex and transmit herewith the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$15, and that the same has been paid in full by the appellant herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Tucson, in said District, this 18th day of December, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America, the one hundred and fortieth.

[Seal] GEORGE W. LEWIS, Clerk United States District Court, District of Arizona.

By Effie D. Botts,
Deputy Clerk.

[Endorsed]: No. 2714. United States Circuit Court of Appeals for the Ninth Circuit. Ong Seen, alias Ong Chong Lung, Appellant, vs. Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Received December 22, 1915.

F. D. MONCKTON,

Clerk.

Filed December 24, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Citation on Appeal (Original).]

United States of America, Ninth Circuit,—ss.

To Alfred E. Burnett, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco on the 24th day of November, 1915, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Arizona, wherein Ong Seen, alias Ong Chong Lung, is appellant and Alfred E. Burnett is respondent, to show cause if any there be why the judgment in said appeal mentioned should not be corrected and speedy justice

should not be done to the parties on their behalf.

Witness the Honorable JOSEPH McKENNA, Justice of the United States Circuit Court of Appeals for the Ninth Circuit, this 26 day of October, in the year of our Lord one thousand nine hundred and fifteen.

WM. H. SAWTELLE, District Judge.

[Endorsed]: No. C-66—Tucson. In the United States District Court, in and for the District of Arizona. Ong Seen, Appellant, vs. Alfred E. Burnett, Respondent. Citation. Filed Oct. 27, A. D. 1915, at 9 A. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk

Service admitted this 26th day of Oct. 1915. Gerald Jones, Asst. U. S. Atty.

[Endorsed]: No. 2714. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 24, 1915. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

C.-66 (TUCSON).

ONG SEEN, alias ONG CHONG LUNG,
Appellant,

VS.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office at Tucson, Arizona,

Appellee.

Order Enlarging time to [December 24, 1915, to] File Record and Docket Case.

It appearing that, by reason of the size of the record in this cause and the time necessary to prepare a transcript thereof, it will be impossible to prepare the same and to file the record with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit on or before November 24th, 1915, that being the return day of the citation heretofore issued and served, now, therefore, for good cause shown, the undersigned, the Judge who signed said citation, does hereby order that the time to file the record in this case and to docket this case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and the return day of said citation, be and the same is hereby enlarged and extended until and including the 24th day of December, 1915.

Done this 22d day of November, 1915.

WM. H. SAWTELLE,

United States District Judge, District of Arizona.

[Endorsed]: C-66 (Tucson). Ong Seen, alias Ong Chong Lung, Appellant, vs. Alfred E. Burnett, Inspector in Charge United States Immigration Office, at Tucson, Arizona, Appellee. Order of Enlargement.

No. 2714. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Dec. 24, 1915 to File Record Thereof and to Docket Case. Filed Nov. 25, 1915. F. D. Monckton, Clerk. Refiled Dec. 24, 1915. F. D. Monckton, Clerk.

In the United States District Court for the District of Arizona.

C.-66 (TUCSON).

ONG SEEN, alias ONG CHONG LUNG,
Petitioner,

VS.

ALFRED E. BURNETT,

Respondent.

Order [Directing Transmission of Original Return, etc., to U. S. Circuit Court of Appeals, etc.].

It being stipulated by and between Struckmeyer & Jenckes, attorneys for the petitioner, and Thomas A. Flynn, United States Attorney for the District of Arizona, representing the respondent herein, that the original of the return to the writ of habeas corpus, together with all exhibits attached thereto, may be sent up to the Circuit Court of Appeals for the Ninth Circuit upon the appeal herein in lieu of a copy thereof, it appearing that such return contains certain exhibits of photographs and documents written in the Chinese language, of which it is impractcable to make copies;

NOW, THEREFORE, it is hereby ordered that the Clerk of this court be and he is hereby directed and ordered to mail said original return to the writ of habeas corpus, together with all exhibits attached thereto, to the Clerk of the Circuit Court of Appeals at San Francisco, California, by registered mail, demanding a return receipt thereof from the United States postoffice, and that said original return to the

writ of habeas corpus, together with all exhibits attached thereto, shall remain in the custody of the Clerk of the said Circuit Court of Appeals until such time as the Circuit Court of Appeals may have received and considered the same, and that when the same shall have been received and considered by the said Circuit Court of Appeals, shall be returned to the Clerk of this Court by registered mail as aforesaid.

Dated this 17th day of December, A. D. 1915.

WM. H. SAWTELLE,

Judge.

[Endorsements]: In the United States District Court for the District of Arizona. Ong Seen, alias Ong Chong Lung, Petitioner, vs. Alfred E. Burnett, Respondent. No. C-66—Tucson. Order. Filed December 17th, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

United States of America, District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify the above and foregoing to be a true, perfect and complete copy of an Order made transmitting the original return to the writ of habeas corpus, together with all exhibits attached thereto, to the Circuit Court of Appeals for the Ninth Circuit upon the appeal of Ong Seen, alias Ong Chong Lung, Petitioner, vs. Alfred E. Burnett, Respondent, C-66 (Tucson), as the same appears from the original on file and of record in the Clerk's office at Tucson.

WITNESS my hand and the seal of said court

affixed hereto at Tucson, this 18th day of December, A. D., 1915.

[Seal]

GEORGE W. LEWIS,

Clerk.

By Effie D. Botts,
Deputy.

[Endorsed]: In the United States District Court for the District of Arizona. Ong Seen, alias Ong Chong Lung, Petitioner, vs. Alfred E. Burnett, Respondent. No. C-66 (Tucson). Certified Copy of Order Transmitting Original Return to Writ of Habeas Corpus to Clerk Circuit Court of Appeals for Ninth Circuit.

No. 2714. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 24, 1915. F. D. Monckton, Clerk

In the District Court of the United States for the District of Arizona.

ONG SEEN, alias ONG CHONG LUNG,
Complainant,

VS.

ALFRED E. BURNETT, Inspector in Charge United States Immigration Office at Tucson, Arizona.

Return to Writ of Habeas Corpus [Original].

Now comes Alfred E. Burnett, Inspector in Charge United States Immigration Service at Tucson, Arizona, the respondent in the above-entitled matter, and for his return to the writ of habeas corpus issued, respectfully shows:

I.

That the said Ong Seen, alias Ong Chong Lung, is an alien, citizen of the Chinese Respublic, who came to the United States from China.

II.

That the said Ong Seen, alias Ong Chong Lung, was duly arrested on April 23, 1914, pursuant to a warrant of arrest issued by the Acting Secretary of Labor on the 16th day of April, 1914, charging the said Ong Seen, alias Ong Chong Lung with being unlawfully in the United States, in that has has been found therein in violation of the Chinese exclusion laws, and is, therefore, subject to deportation under the provisions of section 21 of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910.

III.

That pursuant to the directions contained in said warrant of arrest, the said Ong Seen, alias Ong Chong Lung, was accorded a hearing to enable him to show cause why he should not be deported in conformity with law, said hearing being had before the respondent at his office in the city of Tucson, Arizona, on the 23d day of April, 1914; which hearing was continued from day to day, and concluded on May 5, 1914.

IV.

That at said hearing, said Ong Seen, alias Ong Chong Lung, was represented by counsel of his own selection, and by his said counsel introduced evidence, and was given a [1*] full and fair hearing, and no

^{*}Page-number appearing at foot of page of original Return to Writ of Habeas Corpus.

evidence offered by him was excluded.

V.

That full and complete transcript of said hearing and the proceedings and the evidence had thereat, were thereafter transmitted to the Secretary of Labor, and that thereafter, upon due consideration of the said evidence and proceedings, the said Secretary of Labor did, on the 28th day of May, 1914, issue his warrant for the deportation of said Ong Seen, alias Ong Chong Lung, directing that the said Ong Seen, alias Ong Chong Lung, be deported to the country whence he came.

VI.

That this respondent, at the time of the issuance of the writ of habeas corpus, held the said On Seen, alias Ong Chong Lung, in his custody under and by virtue of the said warrant of deportation so issued by the said Secretary of Labor ordering deportation in due course of procedure.

VII.

This respondent annexes to, and makes a part of, this return a true copy of said warrant of deportation and warrant of arrest, and all other proceedings in said matter.

WHEREFORE, respondent prays that this writ of habeas corpus be dismissed, and that said petitioner be remanded to the custody of respondent for deportation, in accordance with the warrant of deportation issued by the said Secretary of Labor.

ALFRED E. BURNETT.

Inspector in Charge,

Respondent.

THOMAS A. FLYNN.

United States Attorney for the District of Arizona.

By SAMUEL L. PATTU, Assistant Attorney for the Respondent.

United States of America, District of Arizona,—ss.

Alfred E. Burnett, being first duly sworn, deposes and [2] says that he is the respondent named in the foregoing proceeding, and that he has read the foregoing return, and knows the contents thereof, and that the matters therein stated are true, of his own knowledge.

ALFRED E. BURNETT,

Subscribed and sworn to before me this 25 day of June, 1914.

[Seal] GEORGE W. LEWIS, Clerk United States District Court, District of Arizona,

> By Effie D. Botts, Deputy Clerk. [3]

[Warrant for Deportation.] COPY.

WARRANT—DEPORTATION OF ALIEN.
UNITED STATES OF AMERICA.
U. S. DEPARTMENT OF LABOR.
WASHINGTON.

El Pasa No. 5025/558 No. 53780/57

To SAMUEL W. BACKUS, Commissioner of Immigration, Angel Island Station, San Francisco, California.

WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector Alfred E. Burnett, held at Tucson, Arizona, I have become satisfied that the alien, ONG SEEN, alias ONG CHONG LUNG, alias TANG SAN, who landed at the port of San Francisco, Cal., ex SS. "Magnolia," on the 4th day of February, 1913, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said alien is unlawfully within the United States in that he has been found therein in violation of the Chinese Exclusion Laws and is, therefore, subject to deportation under the provisions of section twenty-one of the above-mentioned act, and may be deported in accordance therewith:

I, W. B. WILSON, Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to ———, the country whence he

came, at the expense of the steamship company importing him.

The execution of this warrant will serve to cancel the bond given in behalf of the alien on April 30, 1914.

For so doing, this shall be your sufficient warrant. Witness my hand and seal this 28th day of May, 1914.

W. B. WILSON, Secretary of Labor. [4]

HHD.

[Letter of Inspector Burnett, May 20, 1914, to Supervising Inspector, Transmitting Record of Hearing, etc.]

COURT RECORD.

U. S. DEPARTMENT OF LABOR.

IMMIGRATION SERVICE.

1521/88

Office of Inspector in Charge.
Tucson, Ariz.

May 20, 1914.

In Answering Refer to No. 1521/88.

Supervising Inspector,

Immigration Service,

El Paso, Texas.

Referring to your file No. 5025/558, there is transmitted herewith, in duplicate, record of hearing accorded the alien ONG SEEN, alias ONG CHONG LUNG, alias TANG SAN, pursuant to Departmental warrant No. 53780/57, dated April 16, 1914, the charge being that said alien is in the United States

in violation of the Chinese Exclusion Laws and subject to deportation under section 21 of the Immigration Act. The alien's certificate of identity, No. 10761, accompanies the record. The San Francisco landing record, as an exhibit in this case, is also enclosed, and should be returned to this office for use in any possible habeas corpus proceedings which may eventuate.

The finding is in accord with the charge in the warrant, and is supported by the record, which shows: That the alien was first landed in the United States as a Section Six merchant in 1906, at the port of San Francisco, under the name Tang San; that almost immediately after his first arrival he became a peddler of Chinese herbs, selling them from house to house, and continued [5] in this occupation for Ong Seen, 1521/88, page 2.

about four years; that he then acquired (colorably or otherwise) a \$500 interest in a drug store in San Francisco, and upon this relationship was preinvestigated as a merchant and departed for China on January 23, 1912. The record further discloses that the alien returned to the port of San Francisco on SS. "Mongolia," February 4, 1913, and was promptly admitted as a merchant, member of the firm Doap Luen Hong and Company, of San Francisco. Alien's own testimony shows that immediately upon his return to the United States he again became a peddler of Chinese drugs, continuing in that occupation until he came to Phoenix, Ariz., on the 2d of March of this year; from the 6th of March until these proceedings were commenced, some three weeks later, this alien

was employed as a waiter and general help in a Chinese restaurant at Mesa, Ariz. That he was a regular employee of the restaurant is fully disclosed by the testimony, and is further substantiated by the fact that when he left the restaurant another man was employed to take his place. Witness testifies that he has never received any dividends from his investment in the San Francisco drug store but has "made money peddling medicines."

Further, it now appears that this alien was never lawfuly domiciled in the United States, and that his original Section Six certificate was procured through fraud; note from [6] the record that the alien's Ong Seen, 1521/88, page 3.

lack of knowledge concerning the firm on account of his membership in which the original Section Six certificate was granted him; note letter in the San Francisco record from the Counsel-General at Canton, China, from which it appears that the alien's financial standing had been grossly misrepresented to him, in that the Consul had been lead to believe that the alien was then personally worth \$50,000 Mexican money. This is absolutely inconsistent with the alien's own testimony.

The record as a whole shows that this alien has never been in any true sense a merchant in this country, but a laborer from his first entry, and justifies fully the finding that he is in the United States in violation of the Chinese Exclusion Laws, and that

he is subject to deportation under section 21 of the Immigration Act.

(Signed) ALFRED E. BURNETT,

Isp. Inspector in Charge.

Incl. 11994. [7]

Hearing Before Immigrant Inspector Burnett.
WARRANT HEARING.

IMMIGRATION SERVICE MEXICAN BORDER DISTRICT.

File No. 1521/88.

IN THE MATTER OF ONG SEEN, alias ONG CHONG LUNG, arrested pursuant to Departmental warrant No. 53780/57, dated April 16, 1914, charged with being unlawfully within the United States, in that he has been found therein in violation of the Chinese Exclusion Laws, and is, therefore, subject to deportation under the provisions of Section 21 of the Act Approved February 20, 1907, amended by the Act of March 26, 1910.

Hearing had before Immigration Inspector Alfred E. Burnett, in the office of the Inspector in Charge, at Tucson, Arizona, on this 23d day of April, 1914. Present: ALFRED E. BURNETT, Examining In-

spector.

LEE PARK LIN, Chinese Interpreter.

F. C. STRUCKMEYER, Attorney for the Alien.

LOUIS W. LOWENTHAL, Immigration Inspector.

ABRAM O. HADDEN, Stenographer.

Warrant presented, read, and explained to the alien, who is advised of the nature of the proceedings

and that he may be released from custody during the pendency of the case upon furnishing a satisfactory bond in the sum of One Thousand Dollars (\$1,000.00).

Medical examiner certifies good health.

[Statement of Ong Seen, Alias Ong Chung Lung—April 23, 1914.]

Alien sworn:

My name is Ong Seen; Ong Chong Lung marriage name; I am thirty-two years of age; I was born in Gwoh Yuen village, H. P. District, K. T. Province, China; I am a citizen of China; and of the Chinese Race; I embarked at the port of Hong Kong, China, and landed at the port of San Francisco, California, ex SS. "Mongolia" February 4, 1913; my destination at that time was San Francisco, California; and my occupation merchant; I have no relatives in the United States; in China I have mother, Quan Shee, now in my native village, China, and wife Soo Hoo Shee, in the same place; three sons and one daughter, in the same place; father is dead.

(Examining Inspector Addressing Alier..)

Q. You are advised that you have a right to be represented by counsel at this hearing. Do you desire to avail yourself of this right? [8]

Ong Seen (File 1521/84) sheet 2.

A. Yes. Mr. F. C. Struckmeyer, who is present, is my attorney.

(Examining Inspector to Mr. STRUCKMEYER.)

Mr. Struckmeyer, I hand you the record in this case, including the warrant of arrest. (Handing papers to Mr. Struckmeyer.)

(Examining Inspector Addressing Alien.)

- Q. You claim to be a native-born citizen of the Chinese Republic, do you? A. Yes.
- Q. Did you, at Phoenix, Arizona, on the 29th ultimo make a statement to me through this same Chinese Interpreter relative to your right to be and remain in the United States? A. Yes.
- Q. Did you tell the truth and nothing but the truth in that statement? A. Yes.
- Q. Do you desire to change any statements made at that time?
- A. Yes, I want to change that part of the statement in which I stated that the Doap Leun Hong drug-store location was on Harrison street instead of Second street, as I stated at that examination.
 - Q. Is that the only change you desire to make?
 - A. That is all.
- Q. That statement will be transcribed with and made a part of the record of hearing in this case. (Statement is as follows:)

[Statement of Ong Seen—March 29, 1914.] Phoenix, Arizona, March 29, 1914.

"In the Matter of ONG SEEN, as to the Legality of his Residence in the United States."

ALFRED E. BURNETT, Examining Inspector. LEE PARK LIN, Interpreter.

LOUIS W. LOWENTHAL, Stenographer.

Examining officer addressing alien: I am a Chinese Inspector in the Service of the United States government. I desire to take a statement relative to your right to be and remain in the United States. Any statement you may make should be voluntary

on your part and you are warned that it may be used in any future proceedings. This statement is with particular reference to the legality of your last entry into the United States and as to the legality of your Ong Seen (File 1521/84) sheet 3.

residence [9] in this country. Are you willing to make such a statement?

ONG SEEN.—Yes.

(Alien presents C. I. 10761, issued to Ong Seen, merchant, No. 12505/1-24, 'Mongolia,' February 4th, 1913.)

ALIEN, being first duly sworn, testified as follows:

- Q. (Examining officer addressing alien.) What is your name? A. Ong Seen.
 - Q. By what other names have you been known?
 - A. Ong Chong Lung is my marriage name.
 - Q. Is Ong Seen your boyhood name?
 - A. Yes.
 - Q. In what village and district were you born?
- A. Gwoh Yuen village, H. P. Dist., K. T. Prov., China.
 - Q. On what date were you born?
- A. K. S. 9, 10th month, 15th day (November 14, 1883).
 - Q. What is your father's name?
 - A. Ong Yip Bo.
 - Q. Is that his only name? A. Yes.
 - Q. Where is your father now?
 - A. In my native village, China.
 - Q. What is his occupation? A. He is dead.
 - Q. When did he die and where?

- A. He died in the 7th month, last year, Chinese calendar (August, 1913) in the Lin Teang Lee village, H. P. Dist., China.
 - Q. Is that near your native village?
- A. Just a short distance away; not quite a li distant.
- Q. What was his occupation at the time of his death?
- A. He was a merchant until his death. He was sole owner of the Yick Woh drug store in the Woo Lung Huey market, just a few lis distant from the Lin Teang Lee village.
- Q. For how long was he proprietor of that drug store?
- A. For a great many years; I don't remember how many exactly.
 - Q. Who owns that drug-store now?
- A. The store is still owned by us, but we have another person conducting it, that is we hire someone to manage the store.
 - Q. Who is managing the store?
 - A. I don't know the name of the person.
- Q. Has he conducted the store for your father's estate ever since your father's death?
- A. He was working in the store for my father before my father's death and has conducted it ever since. [10]

Ong Seen (file 1521/84) sheet 4.

- Q. Has the present manager any interest in the store? A. No, he has not.
- Q. About what is the investment in that store, and what is the value of the stock of goods?

- A. I don't know.
- Q. About what was the value the last time you saw the stock of goods?
- A. I don't know; approximately about two thousand dollars, Chinese money.
 - Q. Did you ever work in that store? A. No.
- Q. Did your father ever come to the United States? A. No.
- Q. What is your mother's name and present location?
- A. Quan Shee, now living in the Lin Teang Lee village, China.
 - Q. Has she bound or natural feet?
 - A. Bound feet.
 - Q. Did your father marry more than once?
 - A. Once only.
 - Q. Was your mother ever in the United States?
 - A. No.
- Q. What is the name of your oldest brother, and his location?
 - A. I have no brothers.
 - Q. Did you ever have any brothers? A. No.
 - Q. Did you ever have any sisters? A. No.
- Q. When did you first come to the United States, and where?
- A. K. S. 32/3/14 (April 7, 1906) and landed in San Francisco ex. SS. 'Nippon Maru' as a merchant.
- Q. What friend or relative came with you on that first trip?
 - A. No one, just a tribal cousin named Ong Ngaw.
 - Q. Where is he now? A. I don't know.
 - Q. Where did you go to live immediately upon

your arrival in April, 1906?

- A. Immediately after I landed the fire and earthquake occurred in San Francisco, and I stayed in San Francisco some time after that.
 - Q. How long.
- A. Until I went to China, S. T. 3/12/6 (January 23, 1912).
- Q. From your first landing in the United States until your departure therefrom did you live continuously in San Francisco? A. Yes.
- Q. Didn't you live in Oakland or any of the nearby towns?
- A. I moved over to Oakland after the fire for a year and a few months.
- Q. What did you do during that year and few months? [11]

Ong Seen (File 1521/84) sheet 5.

- A. I procured some Chinese medicines from the Doap Leun Hong drug-store and peddled them.
- Q. Taking them about from house to house for sale? A. Yes.
 - Q. Were these medicines Chinese herbs?
 - A. Yes.
- Q. Do (How) long did you follow that business in Oakland and vicinity? A. About four years.
- Q. Did you peddle those drugs in Oakland all the time or did you include other towns in your itinerary? A. San Francisco and Oakland.
- Q. Where did you make your headquarters during those four years?
- A. I made my headquarters in the Doap Leun Hong drug-store.

Q. Who was the proprietor of that drug-store?

A. It was a company and there were a great number of persons interested in it, but the manager's name was Ong Sin.

Q. What was the location of that drug-store at that time?

A. 610 Second street, Oakland, but it subsequently moved back to San Francisco to 844 Dupont street, San Francisco.

Q. Is it still located at that address?

A. Yes.

Q. During those four years did you just buy those Chinese herbs in small quantities and peddle them from house to house? A. Yes.

Q. Did you have a room and eat and sleep in that drug-store?

A. I didn't stay there permanently, just occasionally.

Q. But you had no interest in that company had you?

A. I did not become a partner in that drug-store until K. S. 34, 6th month (July, 1908).

Q. What interest did you acquire at that time?

A. Five hundred dollars.

Q. Did you buy out the share of some other man?

A. No.

Q. How did you become interested?

A. After the fire they wanted more stockholders so I invested five hundred dollars in that drug-store.

Q. Where did you get that money?

A. Brought it with me from China.

Q. When did you sell your interest in that drug-

store? A. I still have an interest in that store.

Q. The same five hundred dollar interest?

A. Yes.

Q. Have you any stock certificate or other evidence of your interest in the firm?

A. I have no stock certificate but my name is on the book in that store. [12]

Ong Seen (File 1521/84) sheet 6.

Q. Were you ever an active partner in the firm or were you just a silent partner?

A. I was a salesman in the drug-store for over a year before I returned to China.

Q. What wages did you receive during that year?

A. \$400 a year.

Q. During that year did you stay in that store as a salesman or were you a peddler for the store?

A. I was in the store.

Q. When did you return to the United States from that trip?

A. Returned to San Francisco on SS. 'Mongolia,'

C. R. 1, last day of 12th month (February 4th, 1913).

Q. Were you preinvestigated prior to your departure for China? A. Yes.

Q. As of what status?

A. As a merchant, member of the Doap Leun Hong Company.

Q. Did you marry while in China on that trip or before you come to the United States the first time?

A. I married before I first came.

Q. Who is your wife, and where is she?

A. Soo Hoo Shee living in the Lin Teang Lee village with my mother.

Q. What if any children have you?

A. Three sons, and one daughter; oldest boy, Ong Yen Lai; don't remember the exact day and month but he is about 14 years old, according to Chinese reckoning, born in Lin Teang Lee village; second son, Ong Yen Tang and son born in the same village about 12 years old; don't remember the date of his birth; Ong Yen Hong, third son born in the same village CR. 1, 10th month, 15th day (November 22d, 1912); daughter Ong Bo Jung born in KS. 31 (1905) born in the same village.

- Q. Did your wife or any of your children ever come to the United States? A. No.
- Q. What was the first job you had after your return from your trip to China?
- A. Haven't done any work since I returned from China.
- Q. Where did you go immediately after landing in February, 1913?
 - A. Went to the Doap Leun Hong drug-store.
 - Q. For how long did you live there?
 - A. Until I came to Arizona about three weeks ago.
- Q. That would be something over a year would it not? A. Yes.
 - Q. What did you do during that year?
- A. I got some drugs from my drug-store and peddled them off from place to place.
 - Q. Chinese herbs exclusively? A. Yes.
- Q. In other words, you went back to your old job as peddler? [13]

Ong Seen (File 1521/84) sheet 7.

A. Yes.

- Q. In the meantime living in the drug-store?
- A. Yes.
- Q. Eating and sleeping there?
- A. Not all the time; only occasionally.
- Q. Have you a room there?
- A. Yes, most of the time.
- Q. Were there lodgings over the drug-store?
- A. Yes, and there were Chinese living in the building next door.
- Q. Did you have your room over the drug-store or in the drug-store?
- A. Sometimes I would go to my friends and sleep and then I would stay in a room over the drug-store.
- Q. How many of the partners in that drug-store are actively engaged in buying and selling goods in the store? A. I don't know; the manager knows.
 - Q. Who is the manager at present?
 - A. Ong Sin.
- Q. Do you know any of the salesmen in the drugstore?
- A. Yes; Fong Moon Jeang, Ng She Fat, Ng Gee, Lee Eye; I cannot recollect the names of the others.
 - Q. What is the capital stock of the firm?
 - A. \$25,500.
 - Q. Do they do any wholesale business? A. Yes.
- Q. To whom did you say you sold your interest in the firm? A. I have not sold my interest.
- Q. Do you still have a five hundred dollar interest in the firm? A. Yes.
- Q. Have you ever received any dividends from your investment? A. No.
 - Q. Then your interest in that firm is insufficient to

produce an income for your living, is that the idea?

- A. I made money by peddling.
- Q. Have you any interest in any mercantile establishment besides this? A. No.
 - Q. When did you come to Arizona?
 - A. I left San Francisco, February 28th, this year.
 - Q. Come directly to Phoenix? A. Yes.
 - Q. What did you do when you arrived here?
- A. Came to Phoenix trying to find a location to open a store but haven't found it; haven't done anything since I came.
 - Q. How long did you stay in Phoenix?
- A. Just a few days and then I went to Mesa and have been living there, going back and forth. [14] Ong Seen (File 1521/840 sheet 8.
 - Q. You came up from Mesa this morning?
 - A. Yes.
- Q. Where are you making your headquarters in Mesa? A. Arizona Restaurant.
 - Q. Been there about three weeks have you not?
 - A. Yes.
 - Q. How much money have you? A. Haven't any.
 - Q. No money in the bank? A. No.
 - Q. Any money owing you from anyone?
 - A. No.
- Q. How long have you been waiting on the table and cooking around the Arizona Restaurant in Mesa?
- A. I do not work there at all. Only in some instances where there was a rush; just helping them for a moment or so; that is all.
 - Q. The boss of that restaurant says you have been

working there for about three weeks; is he telling the truth? A. I did not work there.

- Q. Isn't it true that during the last three weeks you have put an apron on time and again and waited on the counter and tables? A. Not so.
- Q. What have you received for such services as you have rendered there at the restaurant?
 - A. Haven't received anything.
 - Q. Are you paying board down there? A. No.
 - Q. Paying anything for your lodging?
 - A. No, they are my friends.
- Q. You say you came to Arizona looking for a location for a business without money?
- A. If I found a suitable location I could a borrow and start a store.
- Q. You say the people at the Arizona Restaurant are your friends; which ones are your friends?
 - A. Gee Wah.
 - Q. Where did you know him before?
 - A. San Francisco.
 - Q. Who else is your friend down there?
 - A. No one else.
- Q. Who, if anyone, came to Arizona from San Francisco with you? A. Ong Do Fun.
 - Q. Did you know him in San Francisco?
 - A. Yes.
 - Q. For how long? A. For several years.
 - Q. What was he doing there?
- A. Attending school. (Ong Do Fun now under investigation as the minor son of a merchant, laboring.)
 - Q. Where did he live?

- A. In the Doap Leun Hong store. [15] Ong Seen (File 1521/84) sheet 9.
 - Q. Did you know his father? A. Yes.
 - Q. Who is his father? A. Ong Sin.
 - Q. Manager of the drug-store? A. Yes.
 - Q. Did you know his mother? A. No.
 - Q. Did you ever see Ong Do Fun in China?
 - A. I don't remember having seen him.
 - Q. Does he come from the same village as you do?
 - A. No.
 - Q. Does he come from a near-by village?
 - A. Just a little over a li distant.
 - Q. What is his village? A. Ong Moon village.
 - Q. Did you know him in China?
 - A. I might have seen him but I don't remember.
 - Q. What kin is he to you, if any?
 - A. No kin of mine.
 - Q. Do you know Duck Noy here in Phoenix?
 - A. Yes.
 - Q. Did you ever know him in China?
 - A. I have seen him in China.
- Q. Does he come from the same neighborhood as you do? A. No.
 - Q. Where did you see him in China?
- A. I don't remember at what particular place but the last time I was in China, he was in China.
- Q. Anyone else in Arizona that you knew in China? A. No one else.
- Q. When you made your trip to China, did you take anything with you for delivery to the family of some friends in this country?
 - A. I took something for Ong Sin for delivery to

his wife in China?

- Q. Where does she live? A. Ong Moon village.
- Q. Did you deliver it to her? A. Yes.
- Q. What was it you took? A. Money.
- Q. Did you see her? A. Yes.
- Q. Why did you tell me a minute ago that you did not know Ong Do Fun's mother?
 - A. You didn't ask me whether I knew his mother.
 - Q. I will read the question to you:
 - Q. 'Did you know his mother?
 - A. No.'
 - A. You didn't ask me about his mother.
- Q. Did you ever send anything to China by the hands of a friend? A. No.
- Q. Have you any personal knowledge concerning the American [16] birth of any Chinese children?

Ong Seen (File 1521/84) sheet 10.

- A. No.
- Q. You don't know any Chinese children born in San Francisco or vicinity? A. No.
- Q. Then you cannot be a witness to the American nativity of any Chinese child? A. No.
- Q. Now, you say you were landed as a merchant in 1906; did you have a Section Six certificate?
 - A. Yes.
- Q. What did that certificate show as to your mercantile connections in China?
- A. Said that I was a partner in the Hop Yip Lung store in a place named Check Hong, H. P. Dist., China.
 - Q. Were you a member of that firm at that time?

- A. Yes.
- Q. How much money did you have when you returned from China in February, 1913?
 - A. Just a little money for expenses; that was all.
- Q. Did your father or mother ever have any brothers or sisters in the United States?
 - A. No.
- Q. For the first three weeks you say you have made your headquarters in the Arizona Restaurant in Mesa; how many trips have you made to Phoenix during that time? A. One trip.
 - Q. Is that to-day? A. Twice including to-day.
 - Q. Was yesterday the first trip?
 - A. Day before yesterday.

I HEREBY CERTIFY that the foregoing is a true statement of the record of examination in this case.

(Signed) LOUIS W. LOWENTHAL, Stenographer."

- Q. (By Examining Inspector.) Now, in your statement to me on the 29th ultimo, you said that you first came to the United States, landing at the port of San Francisco, April 7, 1906, as a merchant. How old were you at that time?
 - A. Twenty-four years.
- Q. What kind of document as evidence of your right to land in the United States did you bring with you on that trip?
- A. A document given me by the American Consulat Canton City, China.
- Q. Did you present yourself in person before the American Consul when applying for this document?

- A. Yes.
- Q. Did that document have your photograph on it? A. It has.
- Q. Of what firm did you then claim to be a member?
- A. Member of the Hop Yick Lung store at Check Hom City, H. P. District, China.
- Q. How long were you a member of the Hop Yick Lung store before you came to the United States? [17]

Ong Seen (File 1521/84) sheet 11.

- A. For several years.
- Q. How many years?
- A. How many years does it state on that certificate (addressing the Chinese Interpreter)? About five or six years, more or less; I don't remember exactly.
- Q. Well, was it as much as five years or less than five years?
- A. About five or six years approximately; it has been so long ago I don't remember.
- Q. How old were you when you left China at that time? A. Twenty-four years.
- Q. How old were you when you became a member of that firm, Hop Yick Lung?
 - A. Eighteen or nineteen years old.
 - Q. Was your father also a member of that firm?
 - A. No.
 - Q. What interest did you have in that firm?
 - A. Five thousand dollars.
- Q. Where did you get that much money to put into the business? A. Given to me by my father.

- Q. Your father was running a little store himself at that time, wasn't he, as you have testified?
 - A. Yes.
- Q. And you have testified that the investment in his firm was twenty-five hundred dollars?
- A. I said that his stock of goods in the place was worth about twenty-five hundred dollars. I wasn't certain.
- Q. And at the same time, at the age of eighteen or nineteen years he furnished you five thousand dollars to put into another firm, did he? A. Yes.
 - Q. In what did your firm, Hop Yick Lung deal?
 - A. Hardware.
 - Q. For example?
 - A. Hardware and general merchandise.
- Q. What kind of hardware did the firm buy and sell? A. Hardware of every description.
- Q. You were an active member of the firm, or a silent partner? A. Silent partner.
- Q. Did you ever live in that town in which the Hop Yick Lung Co. was located and doing business?
 - A. Yes.
 - Q. For how long?
- A. It has been so long ago, I don't remember how long.
- Q. Did you ever take any active part in conducting that business of the Hop Yick Lung Co.?
 - A. Yes, for a little while.
 - Q. In what capacity? A. Salesman.
- Q. Where were you living just before you came to the United States the first time?
 - A. Lin Teang Lee village, China.

Q. You were not living in the Check Hom village where the store was at all, were you?

A. No. [18]

Ong Seen (File 1521/84) sheet 12.

Q. You have testified that you came from San Francisco to Phoenix, leaving San Francisco on the 28th day of last February; that you remained in Phoenix a few days and then went to Mesa, Arizona, where you have since been making your headquarters at the Arizona Restaurant. Is that correct?

A. Yes.

Q. In your former statement you denied being a regular employee in the Arizona Restaurant. Do you still make that denial?

A. I never worked there; I just made that my headquarters, that is all.

- Q. You admitted in your statement to me on the 29th ultimo that in some instances where there was a rush in the restaurant that you helped wait on the customers. Is that true? A. Yes.
- Q. I now have read and translated to you a statement made by Inspector Sterling C. Robertson at Phoenix, Arizona, on the 29th ultimo. This statement will be incorporated with and made a part of the record of hearing in this case.

(Statement translated and is as follows:)

[Statement of Inspector Robertson, March 29, 1914.] "Phoenix, Arizona, March 29, 1914.

"STATEMENT OF MOUNTED INSPECTOR STERLING C. ROBERTSON, Jr.

"I was at the train when Ong Seen (C. I. 10761) arrived in Phoenix from San Francisco, Cal., on

March 2d, 1914. He came with Ong Do Fun. landed minor son of merchant now under investigation and laboring at the Arizona Restaurant, Mesa, Arizona. On the sixth instant, I entered the Arizona Restaurant at Mesa, Arizona, about 10 A. M., and as I went in I observed that one of the waiters ran into the kitchen and when I got back to the kitchen this Ong Seen and the other Chinese were standing there. I then inspected the other Chinese establishments at Mesa coming back to the Arizona Restaurant in about an hour, entered the Kitchen and found Ong Seen with an apron on putting pies in the oven. On the 14th instant, I was again in Mesa, and saw Ong Seen serving meals to customers at the lunch counter in this same restaurant. On that trip I asked Mr. Peyton, the City Marshal, if he knew Ong Seen and he said that he knew him by sight and that Ong Seen had been there about ten I asked Mr. Peyton to observe whether Ong Seen worked in the restaurant regularly and he said he would do so. On the 18th inst., I was again in Mesa and again found Ong Seen waiting on tables and the counter at the Arizona Restaurant. On the 27th inst., I again saw him waiting on customers at the lunch counter at the same restaurant.

(Signed) STERLING C. ROBERTSON, Jr.
Mounted Inspector."

Q. (By Examining Inspector.) Did Inspector Robertson tell the truth in this statement? [19] Ong Seen (File 1521/84) Sheet 13.

A. Well, I was merely assisting in that restaurant, and I was not receiving any wages for my services;

I was just there helping.

Q. I now have read and translated to you a statement made to Inspector Lowenthal on the 29th ultimo by Hr. Thomas G. Peyton, the city marshal at Mesa, Arizona. This statement will be incorporated in the record of this hearing and made a part thereof? (Statement translated and is as follows:)

[Statement of Thomas G. Peyton, March 29, 1914.] "In the Matter of ONG SEEN, as to the Legality of His Residence in the United States.

Mesa, Arizona, March 29, 1914.

LOUIS W. LOWENTHAL, Examining Inspector and Stenographer.

THOMAS G. PEYTON, being first duly sworn, testified as follows:

- Q. (Examining Inspector to Witness.) What is your name? A. Thomas G. Peyton.
 - Q. You reside in Mesa, Arizona?
 - A. Yes, I am city marshal here?
- Q. You know a Chinaman here in the Arizona Restaurant by the name of Ong Seen?
- A. Yes, I know him but I didn't know his name until Mr. Robertson told me. He is the tall Chinaman there.
- Q. How long have you seen him around the Arizona Restaurant? A. Three or four weeks.
 - Q. Do you eat there regularly?
 - A. I don't eat there all the time, but quite often.
 - Q. Do you go in that restaurant every day?
 - A. Nearly every day.
- Q: Have you seen Ong Seen around that restaurant more or less regularly?

- A. Every time I go in.
- Q. Inspector Robertson asked you to take particular notice of this man, did he not? A. Yes.
 - Q. What does he do around the restaurant?
- A. Waiting on the counter, and general restaurant work.
 - Q. Has he served you meals? A. Yes.
- Q. Every time you go in that restaurant you find him waiting on the counter or doing other work around that restaurant? A. Yes.
- Q. He seems to be working there just the same as anyone would employed in a restaurant? [20]
 Ong Seen (1521/84) sheet 14.
 - A. Just the same.
- Q. Does he seem to be just helping or regularly working?
- A. He works just the same as any of them around there.
- I HEREBY CERTIFY that the foregoing is a true transcript of the record of examination in this case.

(Signed) LOUIS W. LOWENTHAL, Stenographer."

- Q. (By Examining Inspector.) Is Mr. Peyton's testimony true?
- A. In case when there was a rush of business in the place and they were short-handed I just merely helped them; that was all.
- Q. Now, as a matter of fact, since you had your case investigated on the 29th ultimo, you have quit working at that restaurant, haven't you?
 - A. I went back there for a visit occasionally.

- Q. Have you worked any there at the restaurant since you were investigated? A. No.
- Q. And after you quit working there the proprietor of the restaurant employed a Chinaman with a certificate of residence to take your place, didn't he?
- A. Well, that was their rush season; he was in need of a man, if he could not get one right then and I just helped out, that is all.
- Q. Then, after you quit he got a man in your place, did he? A. Yes.
- Q. Adverting to your first landing in the United States, how much money did you bring with you to the United States at that time?
 - A. I don't remember.
 - Q. Well, approximately, how much?
 - A. I never did take note of it.
- Q. How much were you worth approximately at that time? A. I don't remember.
 - Q. Approximately?
- A. I can't remember; I remembered then, but I don't remember now.
- Q. Well, were you worth as much as two thousand dollars gold? A. More than that.
 - Q. Worth as much as five thousand dollars gold?
 - A. I don't remember.
 - Q. How much are you worth now?
 - A. I don't know how much I am worth.
 - Q. What cash resources have?
 - A. A few hundred dollars.
- Q. Did you get these few hundred dollars since I examined you on the 29th ultimo? A. No.

Q. You told me on the 29th ultimo that you hadn't any money at all, and that you came to Arizona looking for a location for business, but had no money, and that you might be able to borrow money to open business if you should find a location. Why this change in your testimony? [21]

Ong Seen (1521/84) sheet. 15.

A. I understood you to ask me whether I brought any money with me, to Arizona.

Q. I now introduce the San Francisco record No. 12505/1-24, which covers your two landings in the United States. This record will be marked Exhibit "A."

(Examining Inspector to Mr. STRUCKMEYER.)

Mr. Struckmeyer, I hand you the San Francisco record for your inspection.

(Examining Inspector Addressing Alien.)

Q. Have you any further statement to make to show cause why you should not be deported in conformity with law?

Mr. STRUCKMEYER.—In answer to that question by the examining inspector, I desire to ask the indulgence of the inspector and continue the hearing so that we will be afforded an opportunity to determine if any and what evidence we desire to introduce.

(Examining Inspector to Mr. STRUCKMEYER.)
Further hearing is continued in this case until 11
A. M. the 29th instant.

(Examining Inspector Addressing Alien.)

(Through a Chinaman, Charles Bund, who is present.)

Q. Have you understood the interpreter so far in this hearing? A. Yes, I understood.

Hearing continued until 11 A. M. the 29th instant.

[Hearing Before Inspector Burnett—Proceedings Had April 24, 1914.]

Continued Hearing in the Case of ONG SEEN, alias ONG CHONG LUNG, on the 24th day of April, 1914, at 10:55 A. M. at the Office of the Inspector in Charge, Tucson, Arizona.

Present: ALFRED E. BURNETT, Examining Inspector.

LEE PARK LIN, Chinese Interpreter.

F. C. STRUCKMEYER, Attorney for the Alien.

LOUIW W. LOWENTHAL, Immigrant Inspector.

ABRAM O. HADDEN, Stenographer. [22]

Ong Seen (1521/84) sheet 16. (Examining Inspector.)

Q. Are the alien and his counsel ready to proceed? Mr STRUCKMEYER.—Not this morning, Mr. Inspector; in this case I ask a continuance for a reasonable time, to the end that we may be enabled to produce evidence to establish the status of the alleged alien as a merchant and refute previous evidence that he has been engaged in manual labor.

(Examining Inspector to Mr. STRUCKMEYER.)

The witnesses by whom you hope to establish these allegations are located at Phoenix?

Mr. STRUCKMEYER.—At Phoenix and else-

where, but not in the city of Tucson and are not available at this time.

Examining Inspector.—Further hearing in this case will be continued to 1:30 P. M. the 29th instant.

[Hearing Before Inspector Burnett— May 5, 1914.]

On April 29, 1914, at the request of counsel, further hearing in this case was continued until May 5, 1914. The case is reopened at this hour.

Continued Hearing in the Case of ONG SEEN, alias ONG CHONG LUNG on the 5th day of May, 1914, at 11:00 A. M. at the Office of the Inspector in Charge, Tucson, Arizona.

Present: ALFRED E. BURNETT, Examining Inspector.

LEE PARK LIN, Chinese Interpreter.

F. C. STRUCKMEYER, For the Alien.

J. S. JENCKES, For the Alien.

ABRAM O. HADDEN, Stenographer.

(Examining Inspector Addressing Alien and Counsel.)

Q. Are you ready to proceed in this case? Mr. STRUCKMEYER.—We are. [23]

Ong Seen (1521/84) sheet 17.

(Examining Inspector to Mr. STRUCKMEYER.)

Have you any evidence you desire to offer?

Mr. STRUCKMEYER.—We desire to introduce in evidence the affidavit of Ong Sin, executed in the city and county of San Francisco on the 25th day of April, 1914; and the further affidavit of Ong Sin, executed on the 12th day of December, 1908, in the city and county of San Francisco, State of California; and a further affidavit of Ong Sin, executed

on the same day, in the city and county of San Francisco, to which is attached what purports to be a list written in Chinese characters of the members of the firm of Doap Leun Hong & Co.

(Examining Inspector to Mr. STRUCKMEYER.)

The affidavits may be received, and being firmly attached each to the other, marked as one exhibit, to wit: "Ong Seen's Exhibit A." Has counsel anything further to offer in this case?

Mr. STRUCKMEYER.—Nothing further. (Examining Inspector Addressing Alien.)

Q. Is there any further statement you desire to make to show cause why you should not be deported in conformity with law?

A. Nothing further to state.

(Examining Inspector to Mr. STRUCKMEYER.)

Does counsel desire to file brief in this case?

Mr. STRUCKMEYER.—Yes, we desire to file brief, and we can do so by the 18th instant.

(Examining Inspector to Mr. STRUCKMEYER.)

The record will be retained in this office until the 18th for the purpose indicated by counsel.

The alien may remain on bond filed, in accordance with its terms. [24]

Ong Seen (1521/84) sheet 18.

[Findings of Inspector Burnett.]

From the foregoing evidence, the alien Ong Seen, alias Ong Chong Lung, who arrived at the port of San Francisco, California, and was admitted ex SS. "Mongolia" February 4, 1913, is found to be in the United States in violation of the Act approved February 20, 1907, amended March 26, 1910, for the fol-

lowing reasons; to wit, that he entered, and has been found in the United States in violation of the Chinese Exclusion Laws, and is, therefore, subject to deportation under the provisions of section 21 of the abovementioned Act.

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED to the Honorable Secretary of Labor that said alien be deported to China, the country whence he came, in accordance with the provisions of sections 20 and 21 of the Act approved February 20, 1907, as amended by the Act of March 26, 1910.

(Signed) ALFRED E. BURNETT,

Examining Inspector.

I HEREBY CERTIFY that the foregoing is a true and correct transcript of the record of hearing in this case.

ABRAM O. HADDEN,

Stenographer. [25]

Received Jun. 25, 1914. Immigration Service, Tucson, Ariz.

[Alien's Exhibit "A"— Affidavit of Ong Sin, Sometimes Called Yup Chuey, Dated April 25.]

State of California,

City and County of San Francisco,—ss.

Ong Sin, sometimes called Yup Chuey, being first duly sworn, deposes and says:

I am the manager and a member of the firm of Doap Leun Hong and Company, wholesale and retail dealers in Chinese drugs and medicines, doing business at 844 Dupont Street, in the City and County of San Francisco, State of California; that I have

been a resident of the State of California for over twenty-five years, and that I have been a member of the above-named firm for over twenty-five years; that I have been the Manager of the above-named firm since 1908; that the capital stock of the abovenamed firm, consisting of stock on hand and solvent credits, is twenty-eight thousand five hundred dollars (\$28,500.00); that there are fifty-three members of the above-named firm; that the interest of each of the members in said firm is five hundred dollars (\$500.00) or more; that among the said fifty-three members is Ong Seen, a resident of the City and County of San Francisco, State of California, whose interest in the above-named firm is represented by an investment of five hundred dollars (\$500.00); that the said Ong Seen appears on the list of members of said firm as No. 18; that he became a member of said firm in 1908, and ever since has been and now is an active member of said above-named firm, as appears on the list of members attached to the statement, which is a copy of an original on file with the Immigration Service at the Port of San Francisco: that the above referred to statement of the said business, to which is attached the names and residences of each of the fifty-three members, and the amounts each has contributed, is attached to this affidavit and made a part thereof; that the above-named Ong Seen returned to the United States on [26] the Steamship "Mongolia," February 4, 1913; that on or about April 22, 1914, I, the affiant, testified in the case of Lee Yuen Di, 12017/3052, before the Chinese Division at the Immigration Station at the Port of San

Francisco; that Ong Seen would take the place of Ng Se Fat, who departed for China on April 4, 1914, in the active work of a department of the said Doap Leun Hong & Company; that as such member of the above-named firm the said Ong Seen left San Francisco on or about February 28, 1914, for the purpose of investigating business conditions in the State of Arizona, and to arrange with Agents in the State of Arizona to handle the goods of the said Doap Leun Hong & Company, or to establish a branch, or branches, of the above-named firm in the State of Arizona, at such places as business conditions might warrant.

Affiant makes particular reference to the attached copy of the statement of the above-named firm, containing a list of its members, specifically drawing attention to member No. 18, on Page 1 thereof, and to the 18th name on Page 3 thereof.

Affiant attaches hereto, as part of this affidavit, a photograph of said Ong Seen.

ONG SIN.

Signature attested before LLOYD MACOMBER, Notary Public in and for the City and County of San Francisco, State of California.

Subscribed and sworn to before me this 25th day of April.

[Seal] LLOYD MACOMBER,

Notary Public in and for the City and County of San Francisco, State of California.

Photograph of ONG SEEN. [27]

[Affidavit of Ong Sin, Dated December 12, 1908.]

PHOTOGRAPH OF ONG SIN

Ong Sin, sometimes called Yup Chuey, Mgr. whose photograph and signature is hereto attached, being duly sworn according to law, deposes and says that he is and has been for over twenty years a resident of the State of California. That he is and has been for over twenty years a member of the firm of Doan Leun Hong & Co., Dealers in Chinese Drugs and Medicines, Doing business at No. 844 Dupont Street, City and County of San Francisco, State of California.

	Names. Address.	Amount.
1.	Ong Sin sometimes called Yup Cheuy,	
	San Francisco\$	1500.00
2.	Fong Mon Jung, San Francisco,	1000.00
3.	Ng Hong, China	1000.00
4.	Lee Yuen Di, San Francisco	500.00
5.	Lee Yuen Yook, San Francisco	500.00
6.	Ong Gee, San Francisco	500.00
7.	Ng Se Fat, San Francisco	500.00
8.	Hom Lee, San Francisco,	500.00
9.	Lee Hawk Yuen, China	500.00
10.	Fong Lim, San Francisco	500.00
11.	Ng Sun sometimes called Lew Yee,	
	San Francisco	500.00

Mah Gam, San Francisco.....

Ong Ding Lung, San Francisco.....

500.00

500.00

33.

34.

Ong Seen vs. Alfred E. Burnett	Ong	Seen vs	. Alfred	E. B	urnett.
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35.	Names. Address. Ong Forn, San Francisco	Amount. 500.00
36.	Jew Nom, San Francisco	500.00
37.	Oo Bow Dep, San Francisco	500.00
38.	Jew Bock Yick, San Francisco	500.00
39.	Yee Lon Jung, San Francisco	500.00
40.	Wong Yek Tin, San Francisco	500.00
41.	Woey Kui, San Francisco	500.00
42.	Pon Mow, San Francisco	500.00
43.	Ong Ye Lung, Hong Kong	500.00
44.	Wong Jin Kui, San Francisco	500.00
45.	Ong Lang Lok, San Francisco	500.00
46.	Lee Wing, San Francisco	500.00
47.	Wong Man Yew, San Francisco	500.00
48.	Lee Wing Yew, San Francisco	500.00
49.	Ng Lem, San Francisco	500.00
50.	Ong Hoy, San Francisco	500.00
51.	Lee Yen, San Francisco	500.00
52.	Fong Jok, San Francisco	500.00
53.	Ng See Let, San Francisco	500.00

\$28500.00

ONG SIM,

Signature.

Subscribed and sworn to before me this 12th day of December, A. D. 1908.

THOMAS S. BURNES,

Notary Public in and for the City and County of San Francisco, State of California.

Following this is 2 pages of Chinese characters, being the names of all of the above-named members.

[29]

[Affidavit of Ong Sin, Sometimes Called Yup Chuey, Dated December 12, 1908.]

City and County of San Francisco, State of California,—ss.

I, Ong Sin, sometimes called Yup Chuey, being first duly sworn depose and say:

That I am a merchant and Manager of the firm of Doap Leung Hong & Co., Dealers in Chinese Drugs & Medicines, doing business at No. 844 Dupont Street, City and County of San Francisco, State of California.

That the list hereto attached written in Chinese characters is a true list of the members of the said firm of Doap Leun Hong & Co.

ONG SIN.

Subscribed and sworn to before me this 12th day of December, A. D. 1908.

[Seal] THOMAS S. BURNES,
Notary Public in and for the City and County of

San Francisco State of California. [30]

[Warrant to Take Alien into Custody and to Grant Him a Hearing.]

COPY.

WARRANT—ARREST OF ALIEN.
UNITED STATES OF AMERICA.

Received,
Apr. 21, 1914.
Immigration Service,
Tucson, Ariz.

U. S. DEPARTMENT OF LABOR. WASHINGTON.

El Paso No. 5025/558.

No. 53780/57.

To F. W. BERKSHIRE, Supervising Inspector, El Paso, Texas, or to Any Immigrant Inspector in the Service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien, ONG SEEN, alias ONG CHONG LUNG, who landed at the port of San Francisco, Cal., ex SS. "Mongolia," on the 4th day of February, 1913, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, for the following among other reasons:

That the said alien is unlawfully within the United States in that he has been found therein in violation of the Chinese Exclusion Laws, and is therefore subject to deportation under the provisions of Section twenty-one of the above-mentioned Act,

I, J. B. DENSMORE, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law.

The expenses incident to conveying the alien from Mesa to Tucson, Arizona, via. Phoenix, for hearing, as well as the expenses, of detention if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1914." Pending disposition of his case the alien may be released from custody upon furnishing satisfactory bond in the sum of \$1000.

For so doing, this shall be your sufficient warrant. Witness my hand and seal this 16th day of April, 1914.

(Signed) J. B. DENSMORE,

HHD. Acting Secretary of Labor. [31] [Endorsed]:

Tucson, Arizona, May 22, 1914.

WARRANT—ARREST OF ALIEN ONG SEEN, alias ONG CHONG LUNG.

Executed and hearing accorded April 23, 1914 at Tucson, Arizona.

(Signed) ALFRED E. BURNETT, Immigrant Inspector

DEPARTMENT OF COMMERCE AND LABOR. IMMIGRANT SERVICE.

IMMIGRATION FILE

No. 12505

1-24

Subject:

ONG SEEN.

S. F. FILE No. 12505/1–24. TUCSON FILE No. 1521/88 TO BE RETURNED TO S. F. 4/7/14. [32]

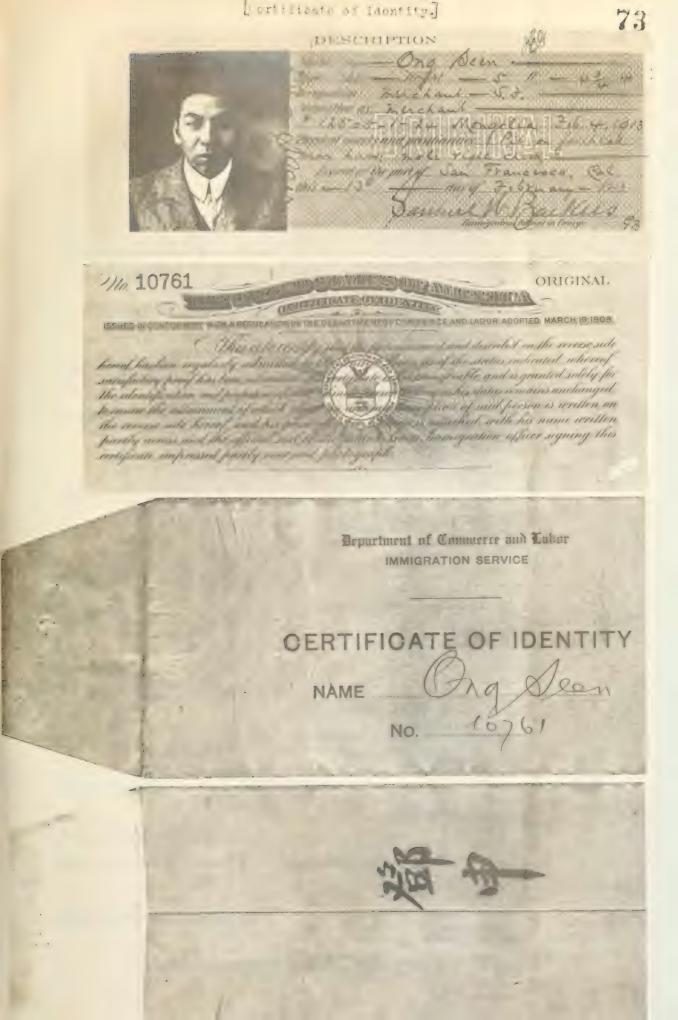
[Exhibits.]

U. S. DEPARTMENT OF LABOR BUREAU OF IMMIGRATION.

No. 53780

57

Subject: Exhibits. [33]





[Record of Arrival of Alien, etc.] ARRIVAL.

Number—12505	
1–24	
Name—Ong Seen.	
Accompanied by——	
Class—Merchant.	
Destination—S. F. Cal.	
Vessel—Mongolia.	
Date—2/4/13.	
Remarks——	
Reported: Favorably	(Date) $2/4/13$.
	W. D. Heitmann
	Inspector.
Forwarded to Law Section	on ————
	Inspector in Charge.
	(Date)——
Approved—Disapproved.	
	,
	For Law Section.
	(Date)———
Admit on Identification.	CITADI EC METIAN
	CHARLES MEHAN,
	Acting Commissioner,
Amnagladuby	(Date) Feb. 4, 1913.
Appealed by —	(D-1-)
Admission Ordered.	(Date)——
Exclusion Ordered by De	evartment Decision.
	(Date)——
Admitted—Deported.	(200)
Doportou:	M. J. DUFFY,
For Deportation	and Detention Division.

(Date) Feb. 4, 1913.

Certificate of Identity, Authorized by C. M. (Date) Feb. 13, 1913.

Certificate of Identity No. 10761. Issued G. B. (Date) Feb. 13, 1913.

[35]

[Letter, November 18, 1913, Acting Commissioner-General to Commissioner of Immigration.]
U. S. DEPARTMENT OF LABOR.

Bureau of Immigration.

Washington. In Answering Refer to

November 18, 1913.

No. 53585-B.

Commissioner of Immigration, San Francisco, Cal.

In response to your letter of the 8th instant, No. 12505-1-24, you are advised that duplicate certificate of identity, No. 10761, issued to ONG SEEN, is signed by yourself. The initials "G. B." appear under the signature, and the initials "J. E. G." are at the top, towards the right, of the certificate.

F. H. LARNED,

CAS—S. Acting Commissioner-General. [36]

[Letter, November 8, 1913, Acting Commissioner to Commissioner-General (Copy).]

DEPARTMENT OF COMMERCE AND LABOR.
Immigration Service.

12505-1-24.

Office of the Commissioner.

Angel Island Station via Ferry Postoffice

San Francisco, Cal., November 8, 1913.

Commissioner-General of Immigration,

Department of Labor,

Washington, D. C.

Information is desired as to whether or not the duplicate certificate of identity, No. 10761, issued to ONG SEEN, covering his admission as a returning merchant ex SS. Mongolia, Feb. 4, 1913, was signed at the time of its transmission to the Bureau. If not, please return it to this office, as it has developed that the original was not signed at the time of delivery. If the duplicate was properly signed, please advise as to what officer's signature is contained thereon, in order that the same may appear on the original.

HK/HLB.

Exact copy as signed by CHARLES MEHAN. Mailed Nov. 8, 1913, by A. H.

Acting Commissioner.

[Letter, November 7, 1913, Chinese Interpreter to Commissioner.]

DEPARTMENT OF COMMERCE AND LABOR.
Immigration Service.

City Office.

Officer of the Commissioner.

Angel Island Station via Ferry Postoffice

San Francisco, Cal., November 7, 1913.

Commissioner of Immigration (Thru' official channels).

Angel Island, California.

Herewith enclosed please find a Certificate of Identity, issued to Ong Seen, Merchant, who was landed from the SS. Mongolia, February 4, 1913. This certificate was delivered to me at this office to-day by Ong Seen, who stated that the certificate was delivered to him by Miss Ah Tie, an interpreter in the Immigration service, and as he was not aware until recently that the signature of the Commissioner of Immigration was omitted, he sends same back for correction.

YONG KAY,

Chinese Interpreter.

Approved:

W. M. GASSAWAY,

Inspector.

Read Certificate of Identity, No. 10761.

Dec. 2, 1913.

[Chinese signature]

Applicant.

Attest: YONG KAY,

Interpreter. [38]

Application taken by Tyl Lung. Pate 2/11/13 Sen Francisco, Pal., FE 3 191 Lo a W. 1804 D Miller E Of 1811 R 16, Fort of San Francisco,
Zun Francisco, Col., FE 3 191
11, 11, 11, 11, 11, 11, 11, 11, 11, 11,
contribute or Mention No. 12361 , issued in the
Toro, ang Seen; 13/4 in a occupation, Murchante;
Var, S. Fr., Cal. Proices prices Pet on forchad near
hair. mole right cheek. 12505 Amitted as Werchant. ro. 7-24 5. Mong. Date 2/4/12.
Give riest errivel and all subsequent trips:
First services K. S. 32 - 3-14 Et american Mouse Landed in
Duarted
Raturned
Decarted
Returned
Fugartal
Disjoin Justice of the rot, give more to have
1. 10 1
:
1 - Verrain 1 - verrain 0.
Die son Hong.
844 Grant are., S.F. Cal.
250 1
Tyl Lung : Apolicant.
6.9 FEB 1 5,1913,



[Identification Record.]

EXEMPT CLASS landed direct from steamer.

San Francisco.

115.05.

No. 1–24, SS. Mongolia, 2–4, 1913.

Class, Merchant.

What are all your names? Ong Sun (On Chung Lung).

How many times have you been married? Once. (Give names of wives, dates of marriage, kind of feet, whether living or dead.)

Soo Hoo Shee, K. S. 26–2–12. B. F., living in China.

How many children have you ever had? 3 boys, 1 girl.

Give name, sex, age, date of birth, and present location of each:

	Na	me.	Age.	Sex.	Birthdate.	Location.
Ong	Yin	Lai	12	\mathbf{M} .	K. S. 27-10-10	in China.
66	66	Tang	10	66	" 29- 5- 5	66 66
44	66	Hong	1	66	C. R. 1-10-19	66 66

Did you take any money, letters, or anything else from the U.S. to anyone in China on this trip? Took \$50 to Ong Sin's family.

Are you accompanied by anyone? (If so, whom.)
No.

SWORN.

[Chinese Signature.] Applicant.

W. D. HEITMANN,

Inspector.

(Signatures.) ED. L. PARK,

Interpreter.

No. 2500-Nov.-1912-4000.

[Application	for	Pre-Investigation.]
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APPLICATION OF LAWFULLY DOMICILED CHINESE MERCHANT, TEACHER, OR STUDENT FOR PREINVESTIGATION OF STATUS.

Bepartment of Commerce and Labor IMMIGRATION SERVICE

Office	of	Commi	341	oner.
--------	----	-------	-----	-------

Port of San Francisco,

December 22, 1911.191

To r. Chas Mehan.

Chinese and Immigrant Inspector

Anzel Island, Cal.

Sir: It being my intention to leave the United States on a temporary visit abroad, and to depart and return through the Chinese

port of entry of San F and i 300 . I hereby apply, under the provisions of Rule 15 of the Regulations of the

I suppose therewith the names of two (or more) "credible witnesses other than Chinese"

who can testify of their own knowledge that for at least one year immediately pre-ceding the date of this application I have been engaged in the occupation of is repart , and have not performed any manual labor except such as was necessary in the conduct of my said occupation. I am prepared to appear personally and to produce before you at such time and place as you may designate the said witnesses and (if a merchant) the partnership or other books of

the firm in which I claim membership. The names and addresses of my witnesses are:

rolacife Alxin FILLE OUT IF MERCHANT

The firm in with Mlaim me ship is known as Poor Loun Hone Co.

Addres No. 844 Grant Ave. St. City San Francisco State

My partners in said business are as set forth in the partnership list of our firm filed .

formed no manual labor other than that necessary to the conduct of the said mercantile business.

TO BE FILLED OUT IF TEACHER OR STUDENT

I have been engaged during the entire year last past in the occupation of teaching or studying (name branches taught or studied)

at the following place or places. and during the said time have not engaged in the performance of manual labor. Signature in Chinese

Subscribed and swom to before me, this day of DEC = 1911

Signature in English Ong Seen

Address 844 Grant Ave., San Francisco, Cal.

Physical marks or peculiarities

right cor

San Francisco

The triplicate of this application having been returned to me by the officer in charge at the port of intended departure, with advices that said officer is prepared to approve the original application, this duplicate is delivered to the applicant (with my signature written across the margin of the photograph), WHO MUST EXCHANGE IT AT THE OFFICE OF THE IMMIGRATION OFFICER IN CHARGE AT THE PORT OF DEPARTURE FOR THE ORIGINAL.

This duplicate is of no value further than to identify the holder as the person whose status has been investigated.

(Signed) Samuel We Backus'



[Memorandum, Dated January 13, 1912.]

DEPARTMENT OF COMMERCE AND LABOR.

Immigration Service.

(Chinese Division.)

Office of the Commissioner. San Francisco, Cal.

Jan. 13, 1912.

Name: 191 Ong Seen.

Class: Ong Seen, Merchant.

Serial No.: 191.

Attorney for applicant: ——.

(Application of above-named Chinese person has been approved.)

844 Grant Ave., S. F.

INSTRUCTIONS:

This memorandum to be handed to registering officer at wharf prior to embarkation.

This memorandum becomes void after sixty (60) days from above-date.

A. HARRISON, Recording Clerk. [42]

Department of Commerce and Cabor IMMIGRATION SERVICE

Port of gan Francisco,

To Mr. Chas. Mehan, Giran and Institute Imputer

ties on a temporary visit abroad, and to depart and return through the Chinese

perce and Labor, for preintestigation of mysolatimed status as a lawfully domiciled. Me no heart

This may be considered their own knowledge that for at least one year immediately pre
stating the rate of this application I have been engaged in the occupation of , and have not performed any manual labor except such as was necessary in the conduct of my said occupation. I am prepared to appear personally and to produce before you at such time and place as you may designate the said witnesses and (if a merchant) the partnership or other books of the firm in which I claim membership.

The names and addresses of my witnesses are:

David alth Stully Letter Corner sta 13

Allen No. 844 Grant Ave. St. City San Francisco State

o 500. and was acquired in July 1908. 19—
of such interest while absent from the United States. During the entire year last past I have per-My interest therein amounts to \$500. It is not my intention to dispose of such ed no manual labor other than that necessary to the conduct of the said mercantile business.

TO BE FILLED OUT IF TEACHER OR STUDENT

I have been engaged during the entire year last past in the occupation of teaching or studying (name branches taught or studied)

at the following place or places. sance of manual labor. and during the said time have not

Subscribed and swom to before me this

day of DEC 2 2 1911

Signature in English Ong goon,

San Francisco

With the information that I am 2224: prepared, on the basis of the evidence submitted with the original of this application, to appear

JAN 1 2 MILE

To Mr. Chas. Mahan

Angel Isdand, Cal

Sir: It being my intention to leave the United States on a temporary visit abroad, and to depart and return through the Chinese

port of entry of San Francisco , I hereby apply, under the provisions of Rule 15 of the Regulations of the

Department of Commerce and Labor, for preinvestigation of any claimed that as a lawfully domiciled ... Merchant ... I subject herewith the rambs of two (or more) "credible witnesses other than Chinese" who can peakly of the year hand to two (or more) "credible witnesses other than Chinese" who can peakly of the year hand to two (or more) "credible witnesses other than Chinese" or who can peakly of the year than the peak of the year immediately preciously the date of this application I have been engaged in the occupation of the year of year of the year of year of the year of year of year of year of year of year of years of year of years of year of yea

WITH MERCHANT 76 & Clay RX

Doop Leun Hong Co

St. City __

My interest therein amounts in \$500. and was acquired in JULY, 1908, 19
It is not my intention to dispose it such interest while absent from the United States. During the entire year last past I have performed no manual labor other-than that necessary to the conduct of the said mercantile business.

TO BE FILLED OUT IF TEACHER OR STUDENT

I have been engaged during the entire year last past in the occupation of teaching or studying (name branches taught or studied)

at the following place or places ...

nance of manual labor. and during the mid time have not

Signiture in English Ong Been Subscribed and swom tofficiore me, this

Address 844 Grant Ave., San Francisco, Cal. day of DEC 2 24911

COMMISSIONER OF IMMISRATION or INSPECTOR IN CHARGE, Port of Sampanied by triplicate hereof, transcripts of testimony and report, in accordance with Rule 15.

Sen Francisco

TAX 3 POST



[Letter, February 23, 1906, Consul General, to Commissioner of Immigration.]

No. 560.

AMERICAN CONSULATE GENERAL, Canton, China.

February 23rd, 1906.

Commission of Immigration, San Francisco, California. Sir.

I have the honor to inform you that I visued today three section 6 certificates issued by the Viceroy of Two Kwang in favor of Chinese subjects, by name, Tang Hong, Tang San and Tang Ngo. Mr. Tang Hong, aged sixteen years is a student and resident of Hoi Ping District, this Province, and intends going to San Francisco to attend a private school to study English before preparing to pursue a course of higher study at the Royal College, where his brother Tang Yut Nam is at present in attendance. He will also bear a draft of \$2000.00 Mexican. His father is a partner in the Man Chun Yuen, Drugstore on 18th Street, Canton, which is worth \$100,000.00. The father's share is \$40,000.00 Mexican.

Mr. Tang San is a Chinese merchant in brass and iron goods of 8 years standing in the Hoi Ping District, this Province, and intends going to San Francisco to establish a firm engaging in general merchandise business. He will take with him \$1,000.00 Gold and will have \$3,000.00 sent him later, by draft. His father is also known to have \$70,000.00 while the

son's personal worth is \$50,000.00 Mexican.

Mr. Tang Ngo is a Chinese merchant in Silk Piece Goods also in the Hoi Ping District, this Province, and desires to go to San Francisco to establish a firm of a similar nature. He will take with him \$1,000.00 Gold and will have \$2,000.00 Gold sent him by draft later. His father is known to have \$60,000.00 while the son's personal worth is \$40,000.00.

The correctness of Messrs. Tang Hong's and Tang Ngo's statements are vouched for by Man Chun Yuen, a prominent [46] druggist on 18th Street, Canton, the capital aggregating over \$100,000.00 and for your information I forward you herewith, enclosed, copies of letters received from the said shop relative to the before-cited applicants. I beg to enclose also for your information copy of a letter received by me from the manager of the Sing Hing firm of this city relative to Mr. Tang San. This firm upon investigation is found to be a bona fide one.

I have made a careful examination of these applicants and their securities and feel satisfied that they are members of the exempt class and as such entitled to enter the United States.

They sail for San Francisco on the S. S. "Siberia" leaving Hong Kong on the 2nd prox.

The certificates in question are numbered 47, 48 and 49.

I am Sir,
Your obedient servant,
J. G. LAY,
Consul General.

Enclosures:

- 1. Man Chun Yuen to Mr. Lay, February 19th, 1906.
- 2. Man Chun Yuen to Mr. Lay, February 20th, 1906.
- 3. Shing Hing to Mr. Lay, February 19th, 1906.
 [47]



Born in China never in W. 9. APR 6 - 1906 MET CLASS. CONGRESS of THE V ACT to amend an act weed May 6, 1882. been designated for that mber of one of the exempt ment to go to and reisde of the statements contained on to whom the certificate ... Title or official rank. utile busines Clack H. 松莹 H Specific character of H de duration of his stay in tebruary 1000 6 hun Shinen States Government for the made a thorough investigaon to be in all respects true. r may be admitted to the photograph, gree which I al Seneral, Canto CF

ner main MPT CLASS. APR 6 - 1906 CONGRESS of THE N ACT to amend an act ward May 6, 1882. & he a design ded for that · mor of one of the exempt iment to go to and reisde of the statements contained com to whom the certificate Title or amoint rant; Maro T. , Hor Dung West 騎 until business Chack then 京 H . Specific character of H I mil: ble duration of his stay in tebruary 1000 6 Jun Shinen hinu. States Government for the mode a thorough investiga-盖簧用名 em to be in all respects true. ir may be admitted to the 1 photograph, over which I ul Beneral, Canton. CF

CERTIFICATE FOR CHINESE SUBJECT

In compriduce with the provingous of Section 6 of an Ac UNITED STATES OF AMERICA, approved July 5, 1884, cole entitled An Act to Secute cortain treaty stipulations relating to Chin

TING CERTIFICATE is issued by the undersigned. purpose by VIO Greenment of China, to show that the person hereingten classes described best id Act and as such has the premission of said with in the taritory of the United States, after an investigation and veri herein by the lawfully constituted agent of the United States in this co

The Tolly of description is submitted for the identification of relates ?-Name. it july in proper signature of boarer Jang Van Physical pec di Date of birth . Height ...

Where pursed Lin Cheunghi ... How long pursued.

Present occupation Copper merchant When persond

Where pursued Chack Journ Jan, Son Hum long po Last place of actual residence ... Then Cheung de

(NOTE: If a merchant the following blanks should be filled .

Tille of present merchantile business of Jick Long, soution of

How long said business has been pursued.

Amount invested (goll) in said buse ress ...

Pleant estima'ed value of said business....

merchanlise handled in said businese Ton

(NOTE: If bearer is a travel r the following blanks should be

Fin taxial sterling of be erer in his own country

the Uning States Issur I at Canton, Caine, on this

举春煊

Surperintendent of Imperial Chin se Customs, Can

I, the undersigned duly authorized Consult officer of the U territory within which the person named in the above certificate resides tion of the state uent; contained in the fore joing cirtificate and have for and ascordingly attac's my signature and official seal in order that the United States upon identification as the person represented by the at have jurily placed my official seal.

Impression R: mid fluger

mpression Rt : thum .





[Letter, February 19, 1906, Man Chun Yuen to Consul General (Copy).]

COPY.

Canton, February 19th, 1906.

Honorable J. G. Lay,

U. S. Consul General, Canton, China.

Honored Sir,

We beg to say that Tang Ngo is a shareholder of \$5,000.00 of the Kwong Wing piece goods shop in Chuck Hum of San Ning District. The capital of the said shop is \$30,000.00. Now the said Tang Ngo is going to start a piece goods shop in San Francisco.

We guarantee that all his statements are true.

Your obedient servant,

Sgd.—MAN CHUN YUEN. [48]

[Letter, February 20, 1906, Man Chun Yuen to Consul General (Copy).]

Canton, 20th February, 1906.

Hon. U. S. Consul General, Canton, China.

Honored Sir,

We declare that Tang Hong is a scholar in Hoi Ping District. Now the said Tang Hong desires to go to San Francisco to study English, as he is requested to do so by his brother Tang Yut Nan, who is studying English in the Royal College in San Francisco. Tang Hong will first go into a private school, and after completing his preparatory course will go into the Royal College, to acquire a profession. School fees and every necessary expense will be paid

and attended to by his father Tang Ip Choi, which will be sent to him addressed Chap Lan Tong Druggist in Dupon Street, No. 906, when required. At present Tang Hong takes with him \$1000.00 gold.

His father is one of our shop's shareholders; we are therefore quite willing to guarantee him.

Yours obediently,

Sgd.—MAN CHUN YUEN. [49]

[Letter, February 19, 1906, Shing Hing to Consul General (Copy).]

COPY.

Canton, February 19th, 1906.

Honorable J. G. Lay,

U. S. Consul General, Canton, China.

Honored Sir,

We respectfully beg to state that Tang Shan is the owner of \$4,000.00 of the shares of the brass and iron goods shop "Hop Yick Lung" in Chick Hum of San Ning District. The capital of the said shop is \$40,000.00. Now, Tang Shan is going to set up business as wholesale sundry goods shop in San Francisco.

We guarantee that all his statements are true.

Yours obedient servant,
Sgd.—SHING HING. [50]

[Endorsed]: 2655–C. Receipted for Section Six (6) Certificates: (1) Tang Hong, 23. (2) Tang San, 21. (3) Tang Ngo, 22. Am. Maru. Apr. 6/06. [Stamped:] U. S. Immigration Service, Port of

San Francisco, Mar. 31, 1906. Chinese Division.

DEPARTMENT OF COMMERCE AND LABOR.

File with 21 Am. Maru, Apr. 6/06.

Apr. 6, 06.

Sec. 6. [51]

Certif.—21. Serial ——.

Name—Tang San.

Class—Sec. #6 C. M.

Place—....

Ex. S. S. Am. Maru, Apr. 6, 1906.

Registration—....

Partnership—.....

Apr. 6, 1906.

I respectfully recommend admission.

CHARLES MEHAN,

Inspector in Charge.

[Stamped]: Insp. in Charge Chinese Bureau. Land within named Chinese passenger, on identification. Apr. 6, 1906.

H. H. NORTH,

Commissioner of Immigration.

[Stamped]: Chinese Inspector Comply. Boyce. With Above Order.

CHARLES MEHAN,

Chinese Insp. in Charge.

I have this day landed the within named Chinese, as per above order.

Apr. 6, 1906.

M. BOYCE, Inspector.

[Letter, January 12, 1912, Chinese Inspector to Chinese Inspector in Charge.]

DEPARTMENT OF COMMERCE AND LABOR.
Immigration Service.

Office of the Commissioner. San Francisco, Cal.

Jan. 12, 1912.

Chinese Inspector in Charge, Angel Island, Cal.

Sir:

In re ONG SEEN, Merchant Departing, Serial No. 191:

I have examined the store of Doap Leun Hong Co., 844 Grant Ave., San Francisco, in which applicant claims an interest, and find it to be a genuine mercantile establishment, with no apparent prohibitive features.

Statements of applicant, manager and two white witnesses have been taken, and I find no material discrepancies.

Applicant states he first came to this country K S 32-3-14, as Sec. 6 C. M. This is verified by papers herewith from Record Room, #21 Am. Maru, April 6, 1906, Tang San, Sec. 6. C. M.; photo. thereon in my opinion is that of applicant.

Translation of partnership list of Doap Leun Hong Co., filed in case of Ong Jang Tong, Mer. Dep., Ser. #2243, June 22, 1911, shows name of Ong Shin, \$500, salesman.

I am of the opinion that applicant has proven his right to be and remain in this country; and that he is and has been for more than a year last past a merchant as claimed. I therefore recommend favorable action. All papers herewith.

Respectfully,

FRANK HAYS, Jr., Chinese Inspector.

FH-AMR.

Exhibit, from Rec. Room:

#21 Am. Maru, Apr. 6, 1906. [53]

[Statement of H. A. Page—January 11, 1912.] CHINESE DIVISION.

San Francisco, Cal., Jan. 11, 1912.

Serial No. 191.

ONG SEEN,

Merchant Departing.

Insp.—FRANK HAYS, Jr.

Steno.—ALICE M. RANKIN.

White Witness—H. A. PAGE.

Sworn.

- Q. What is your name? A. H. A. Page.
- Q. Your occupation and where?
- A. Drayman, 764 Clay St., S. F.
- Q. Does your business bring you in contact with Chinese? A. Yes, sir.
- Q. Who is this man? (Showing photo, of applicant.) A. Ong Seen.
 - Q. What is his occupation and where?
- A. Merchant, Doap Leun Hong Co., 844 Grant Ave., San Francisco.
 - Q. How long have you known him?
 - A. About a year.
 - Q. Are you sure it is a full year?

- A. Yes. The manager said he had been there constantly for fourteen months.
- Q. How long have you been doing business with A. Ten or twelve years. this firm?
- Q. Are you satisfied in your own mind you have seen this man there for at least a year?
 - A. Yes, sir.
- Q. How often during the past year have you visited this store?
 - A. I go there two or three times a week.
- Q. Do you as a rule find this man there, and have you during the past year? A. Yes, sir.
- Q. Have you had business dealings with him during the past year? A. No.
- Q. Have you ever seen him selling goods in that firm?
- A. I see him wrapping up packages, preparing and mixing medicine. It is a drug-store.
 - Q. Who is the manager? A. Ong Sin.
- Q. Has Ong Seen done any work as a laborer during the past year?
- A. No. I don't see how he could have. I see him in the store all the time.
- Q. Is this store connected with a barber shop, restaurant, gambling establishment, or any of the prohibitive features? A. No.
- Q. You believe this man to be a genuine merchant A. Yes. of this firm?
- Q. And this firm to be a genuine mercantile establishment? A. Yes.

(Signed) H. A. PAGE.

1-12-12. [54]

[Letter, January 10, 1912, Under Clerk to Inspector in Charge.]

DEPARTMENT OF COMMERCE AND LABOR.
Immigration Service.

Office of the Commissioner.

Angel Island Station

Via Ferry Postoffice

San Francisco, Cal., January 10, 1912.

Inspector in Charge,

Chinese Div./Immigration Service, Angel Island, California.

Sir:

In re Ong Seen (Ong Chong Lung), Merchant Departing, Serial No. 191:

The only name similar to that of the applicant arriving on the vessel and date claimed is Tang San, Section 6, Canton Merchant, No./21 America Maru, April 6, 1906.

Respectfully,
C. M. LARUE,
Under Clerk.

[Stamped]: U. S. Immigration Service, Port of San Francisco, Cal. Received Jan. 11, 1912,..M. [55]

[Statement of B. M. Poetz—January 8, 1912.] CHINESE DIVISION.

San Francisco, Cal., Jan. 8, 1912.

Serial No. 191.

ONG SEEN,

Merchant Departing.

Insp.—J. B. McCHESNEY.

Steno.—ALICE M. RANKIN.

White witness—B. M. POETZ.

Sworn.

- Q. What is your name? A. B. M. Poetz.
- Q. Your occupation?
- A. California wines and brandies, 720 Pacific St., San Francisco.
- Q. Does your business bring you in contact with Chinese? A. Yes, sir.
- Q. Do you recognize that man? (Showing photo. of applicant.) A. Yes, sir.
 - Q. What is his name? A. Ong Seen.
 - Q. How long have you known him?
- A. About a year or fifteen months, something like that.
 - Q. What is his occupation?
- A. He is one of the partners of Doap Leun Hong Co., 844 Grant Ave., S. F.
- Q. Has he been connected with that firm since your first acquaintance with him?
 - A. To my knowledge, yes, sir.
- Q. How often during the past year have you visited that store? A. Two times a week.
 - Q. Do you find him there when you go there?

- A. Yes, I find him there.
- Q. Have you ever seen him wait on customers?
- A. I have. I have seen him handle packages, and one thing and another.
- Q. His manner has been that of a proprietor, has it?
 - A. One of the proprietors, yes, sir.
- Q. Has the store any of the prohibitive features, such as connection with a restaurant, lodging-house, pawn-shop, or barber-shop?
 - A. No, sir, nothing like that.
 - Q. What kind of goods does this firm handle?
 - A. Drugs.
- Q. Has he done any work as a laborer during the past year? A. Not that I know of.
- Q. What is your opinion from what you know of him?
- A. Well, he has been giving me orders once in a while, you know, orders for goods which I have sold him. That is about all I know of him.
- Q. From your personal knowledge of the man, do you consider him a genuine merchant?
 - A. I do, yes.
 - Q. And the store is a genuine store?
 - A. Yes, sir.

(Signed) B. M. POETZ.

1-10-12. [56]

[Record Room Request.] RECORD ROOM REQUEST.

(To be in duplicate.)

Angel Island, Cal., Jan. 8, 1912.

IN CASE OF: Name, Ong Seen; No. ——; Class, Mcht. Dep.; SS. Ser. #191; Date, ——.

DESCRIPTION OF TRIP TO BE VERIFIED:

All names: Ong Seen (Ong Chong Lung).

Relationship: Op.

3 KS. 32–3–14 (Am. date) Ap. 7, 1906; SS. Am. Maru.

Ret. KS. ——— (Am. date) ————; SS. ————.

Last occupation and location: Ser., 6 C. M.

Age at time of Ar.: 24; Sex: Male.

Remarks:

FRANK HAYS, Jr.

Chinese Inspector.

(Approved)

CHARLES MEHAN,

Chinese Inspector in Charge.

Record Clerk. [57]

[Statement of Ong Seen (Ong Yip Chuey)—January 8, 1912.]

CHINESE DIVISION.

San Francisco, Cal., Jan. 8, 1912.

Serial No. 191.

ONG SEEN,

Merchant Departing.

Insp.—FRANK HAYS, Jr.

Intp.—YONG KAY.

Steno.—ALICE M. RANKIN.

Applicant sworn.

(Applicant speaks See Yip dialect. Intp. Yong Kay speaks See Yip originally.)

- Q. What are your names?
- A. Ong Seen (pronounced Shin). Ong Chong Lung. No other name.
 - Q. Have you ever been known by any other name?
 - A. No.
 - Q. How old are you? A. 29.
 - Q. Where were you born?
 - A. Hoy Ping District, China.
 - Q. When did you first come to the United States?
- A. KS. 32-3-14, American Maru, as Sec. 6 C. M., under the name of Ong Seen (Shin).
 - Q. Do you remember your ticket number?
 - A. No. There were not many on the steamer.
 - Q. Where is your Section Six certificate?
- A. I did not get it back. It is in the Chinese Division.
 - Q. Have you made any trips to China? A. No.
 - Q. Have you any papers showing your right to

be and remain in the United States? A. No.

- Q. Are you married? A. Yes.
- Q. What is your wife's name, age and feet?
- A. Soo Hoo Shee, 29, bound feet, only wife I ever had, now in China.
 - Q. When and where were you married?
 - A. KS 26-2-12, in China.
 - Q. How many children have you?
 - A. Two boys and one girl.
- Q. Give their names, ages, birth dates and whereabouts.
- A. Ong Yin Lai, 11, born KS. 27–10–10, now in China. Ong Yin Teung, 9, born KS. 29–5–5, now in China. My girl is Ong Bow Jong, 7, born KS. 31–10–15, now in China. They are all the children I ever had.
 - Q. What is you present occupation?
- A. Merchant of Doap Leun Hong Co., 844 Grant Ave., San Francisco.
 - Q. When did you join that firm?
 - A. KS. 34-6-20.
 - Q. Where was the firm located at that time?
 - A. Same address.
 - Q. What is your interest? A. \$500.
 - Q. Has that always been your interest?
 - A. Yes.
 - Q. What is the capital stock? A. \$28,500.
- Q. Have you been an active member continuously since you first joined the firm?
 - A. No. I became an active member ST. 2–10–1.
- Q. What were you doing before you became an active member?

- A. I was in the same store selling goods, and selling goods outside, but I had no official position in the store until ST. 2–10–1.
- Q. Under which of your names does your interest appear on the books of the firm?
 - A. Ong Seen (Shin).
 - Q. How many members in the firm? A. 53.
 - Q. How many active? A. 14. [1—62]
- #191, ONG SEEN, Mer. Dep. Applicant. 2.
 - Q. Name those active members.
 - A. Ong Sin, manager.

Fong Moon Jung, bookkeeper.

Lee Yuen Ai, salesman.

Ng See Fat, salesman.

Ng See Lit, salesman.

Ng Kai Yip, salesman.

Ong Fun, salesman.

Ong Yut Hong, salesman.

Lee Wing Yow, salesman.

Ao Bow Dip, salesman.

Chin Sung, salesman.

Chin Way, salesman.

Ong Jee, salesman.

Ong Seen (Shin), myself, salesman.

(NOTE. Translation of partnership list of Doap Leun Hong Co. filed in case of Ong Jang Tong, Mer. Dep., Ser. #2243, appears name of Ong Shin, \$500, salesman.)

- Q. When did Chin Way become an active member? A. 6th month, 10th day of ST. 3.
- Q. Who was the last active member of your firm to go to China, whose case was investigated?

- A. Ong Jang Tong (Ser. 2243), went to China ST 3-6th month, 20th day, on the Manchuria.
 - Q. What salary if any do you receive?
 - A. \$400 a year.
- Q. What dividend if any did the firm pay for ST. 2?
- A. There were some profits for that year, but the dividend has not been declared.
- Q. When did Ong Sin, the present manager, become manager?
- A. I don't know. I think KS. 34, but I don't know.
- Q. Is all your time occupied in the store as salesman? A. Yes.
 - Q. Who are your white witnesses?
 - A. Mr. Poetz. He is a liquor dealer.
 - Q. How long have you known him?
 - A. Since I became an active member of the store.
- Q. How often during the past year has he visited your place of business? A. Once a week.
- Q. Have you had business dealings with him during the past year?
- A. Generally when he comes to the store, the book-keeper gives him the orders for liquor. I don't remember whether I ever did give him any orders my-self or not.
 - Q. Who is your other witness?
 - A. A letter-carrier; I can't pronounce his name.
- Q. Do you know any other white men besides these two who visit your store two or three times a month? A. I can't think of any.

- Q. What kind of goods does your firm handle?
- A. Drugs.
- Q. Who does your dray work? A. Mr. Page.
- Q. How long have you known him?
- A. Since I became an active member of the store.
 [2—61]

Ser. #191, ONG SEEN, Mer. Dep. Applicant. 3

- Q. How often does he come to your store?
- A. About once a week.
- Q. Have you understood the interpreter?
- A. Yes.
- Q. Have you anything further to state?
- A. No.

(Intp. Lee G. Dean asks applicant if he has understood Intp. Yong Kay, and applicant states he has.)
(Signed) [Chinese Signature.]

1-9-12 [3-60]

[Statement of Ong Seen (Ong Yip Chuey)—January 8, 1912.]

CHINESE DIVISION.

San Francisco, Cal., Jan. 8, 1912.

Serial No. 191.

ONG SEEN,

Merchant Departing.

Insp.—FRANK HAYS, Jr.

Intp.—YONG KAY.

Steno.—ALICE M. RANKIN.

Manager—SWORN.

(Manager speaks See Yip dialect. Intp. Yong Kay speaks See Yip originally.)

- Q. What are your names?
- A. Ong Sin. Ong Yip Chuey. No other name.

- Q. How old are you? A. 48.
- Q. Where were you born?
- A. Hoy Ping district, China.
- Q. When did you first come to this country?
- A. KS. 7.
- Q. Have you testified in this office recently?
- A. In the case of Ong Jang Tong, Merchant Departing, (Ser. 2243), 6th month of this year.
- Q. Were your trips to China and family history given at that time? A. Yes.
 - Q. What is your present occupation and where?
- A. Merchant and manager of Doap Leun Hong Co., 844 Grant Ave., S. F.
 - Q. When did you join that firm?
 - A. KS 14.
- Q. Have you been an active member continuously since except during your absence on your trips to China?
 - A. Yes.
 - Q. What is your interest? A. \$1500.
 - Q. When did you become manager? A. KS. 34.
 - Q. Have you been manager since then?
 - A. Yes.
 - Q. What is the capital stock? A. \$28,500.
 - Q. How many members? A. 53.
 - Q. How many active? A. 14.
 - Q. Give their names.
 - A. (Gives names same as applicant.)
 - Q. When did Chin Way become an active member?
 - A. 6th month of ST. 3.
 - Q. Who is this? (showing photo. of applicant.)
 - A. My partner, Ong Seen (pronounced Shin).

- Q. When did he join your firm?
- A. KS. 34—6—20.
- Q. Has he been an active member continuously since then?
- A. No. He did not become active until the 10th month of ST. 2.
- Q. What was he doing prior to the time he became an active member?
- A. He was selling goods for himself, and helping in the store.
- Q. Has all his time been occupied as salesman in the store during the past year? A. Yes.
 - Q. What salary, if any, does he receive?
 - A. \$400 a year.
 - Q. Who are his white witnesses?
 - A. A liquor dealer, Mr. Poetz.
- Q. How often during the past year has he visited your store? A. Every week.
- Q. Does he have any business dealings with applicant? [4—59] A. I think so.
 - Q. Who is the other witness?
 - A. Mr. McNulty, letter-carrier.
- Q. What other white men frequently visit your store? A. Mr. Page, the drayman.
- Q. How often during the past year has he visited your store? A. Mostly every day.
 - Q. Have you anything further to state?
 - A. No.
 - Q. Have you understood the interpreter?
 - A. Yes.

(Presents partnership book, which Intp. Yong Kay examines and states contains following: On cover

"Partnership book Doap Leun Hong Co." Pages 1 and 2, rules and regulations of the company. Pages 3 to 15, list of members and their interests, among which is Ong Seen (Shin), interest \$500.)

(No other interpreter available.)

(Signed) [Chinese signature.]

1-9-12 [5-58]

CHINESE DIVISION.

San Francisco, Cal., Jan. 8, 1912.

Serial No. 191.

ONG SEEN,

Merchant Departing.

Insp.—FRANK HAYS, Jr.

Intp.—YONG KAY.

Steno.—ALICE M. RANKIN.

Manager—SWORN.

(Manager speaks See Yip dialect. Intp. Yong Kay speaks See Yip originally.)

- Q. What are your names?
- A. Ong Sin. Ong Yip Chuey. No other name.
- Q. How old are you? A. 48.
- Q. Where were you born?
- A. Hoy Ping district, China.
- Q. When did you first come to this country?
- A. KS. 7.
- Q. Have you testified in this office recently?
- A. In the case of Ong Jang Tong, Merchant Departing, (Ser. 2243), 6th month of this year.
- Q. Were your trips to China and family history given at that time? A. Yes.
 - Q. What is your present occupation and where?

- A. Merchant and manager of Doap Luen Hong Co., 844 Grant Ave., S. F.
 - Q. When did you join that firm?
 - A. KS. 14.
- Q. Have you been an active member continuously since except during your absence on your trips to China? A. Yes.
 - Q. What is your interest? A. \$1500.
 - Q. When did you become manager?
 - A. KS. 34.
 - Q. Have you been manager since then?
 - A. Yes.
 - Q. What is the capital stock? A. \$28,500.
 - Q. How many members? A. 53.
 - Q. How many active? A. 14.
 - Q. Give their names.
 - A. (Gives names same as applicant.)
 - Q. When did Chin Way become an active member?
 - A. 6th month of ST. 3.
 - Q. Who is this? (Showing photo. of applicant.)
 - A. My partner, Ong Seen (pronounced Shin).
 - Q. When did he join your firm?
 - A. KS. 34—6—30.
- Q. Has he been an active member continuously since then?
- A. No. He did not become active until the 10th month of ST. 2.
- Q. What was he doing prior to the time he became an active member?
- A. He was selling goods for himself, and helping in the store.
 - Q. Has all his time been occupied as salesman in

the store during the past year? A. Yes.

- Q. What salary, if any, does he receive?
- A. \$400 a year.
- Q. Who are his white witnesses?
- A. A liquor dealer, Mr. Poetz.
- Q. How often during the past year has he visited your store? A. Every week.
- Q. Does he have any business dealings with applicant? [63] A. I think so.
 - A. I think so.
 - Q. Who is the other witness?
 - A. Mr. McNulty, letter carrier.
- Q. What other white men frequently visit your store? A. Mr. Page, the drayman.
- Q. How often during the past year has he visited your store? A. Mostly every day.
 - Q. Have you anything further to state?
 - A. No.
 - Q. Have you understood the interpreter?
 - A. Yes.

(Presents partnership book, which Intp. Yong Kay examines and states contains following: On cover "Partnership book Doap Leun Hong Co." Pages 1 and 2, rules and regulations of the company. Pages 3 to 15, list of members and their interests, among which is Ong Seen (Shin), interest \$500.)

(No other interpreter available.)

(Signed) [Chinese signature.]

1-9-12. [64]

[Endorsed]:

Correspondence No. —

APPLICATION OF LAWFULLY DOMICILED CHINESE MERCHANT, TEACHER, OR STUDENT FOR PREINVESTIGATION OF STATUS.

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

Angel Island, Cal.

0
Serial No. 191.
Name—Ong Seen.
Address—844 Grant Ave.
Date of receipt—Dec. 22, 1911.
Received from Applicant. O. K., H. C. K.
Action by Commissioner: Jan. 13, 1912.
Date,
Action by Bureau:
Date,

Remarks.

59

Departed from San Francisco.

Per Steamer MONGOLIA. Jan. 23, 1912.

Inspector. [65]

[Endorsed]: C—66 (Tucson). In the United States District Court, District of Arizona. In the Matter of the Application of Ong Seen, alias Ong Chong Lung, for Writ of Habeas Corpus. Return to Writ of Habeas Corpus. Filed June 25, A. D. 1914, at .. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

No. 2714. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 24, 1915. F. D. Monckton, Clerk.

IN THE

Uirruit Court of Appeals

For the Ninth Circuit

ONG SEEN, Alias ONG CHUNG LUNG,

Appellant.

US.

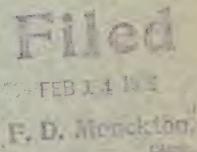
ALFRED E. BURNETT, Inspector in Charge, United States Immigration Office at Tucson, Arizona,

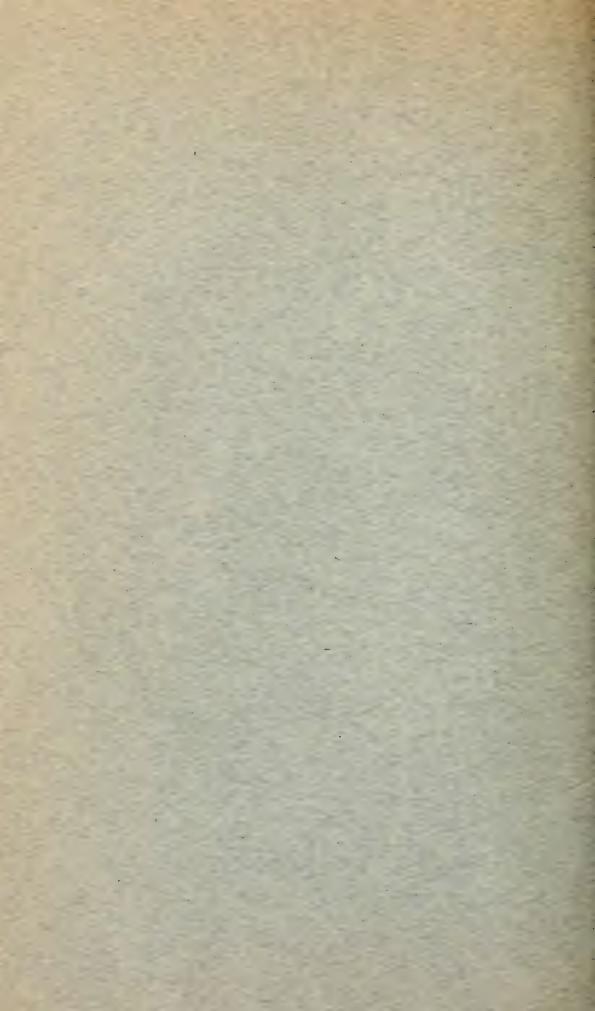
Appellee.

Brief of Appellant

Upon Appeal From the United States District Court for the District of Arizona.

STRUCKMEYER & JENCKES
Attorneys for the Appellant.
Phoenix, Arizona





No. 2714

IN THE

Uircuit Court of Appeals

For the Ninth Circuit

ONG SEEN, Alias ONG CHUNG LUNG,

Appellant.

US.

ALFRED E. BURNETT, Inspector in Charge, United States Immigration Office at Tucson, Arizona,

Appellee.

STATEMENT OF THE CASE.

The appellant, a Chinene alien, was arrested by the appellee, Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona, pursuant to a warrant of arrest issued April 16, 1914, by the acting Secretary of Labor, under Section 23, Act of Congress March 4, 1913, charging the appellant with being unlawfully in the United States in violation of the Chinese Exclusion Law. A hearing was had before the appellee at Tucson, Arizona, on April 23 and 24th, 1914, and on May 5th, 1914, at which hearings evidence was received by the appellee, from which evidence the Secretary of Labor on May 28th, 1914, adjudged the appellant unlawfully in the United States in violation of

the Chinese Exclusion Act and ordered his deportation to the country whence he came.

The appellant thereupon filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona, alleging in substance that such finding and order of the Secretary of Labor was against the uncontroverted evidence and without authority in law. The writ having been granted, the appellee made return thereto, setting up the issuance of the warrant of arrest mentioned, the hearing before him and the subsequent order of deportation, and attaching to his return the full evidence taken before him and upon which the order of deportation was based.

The appellant demurred to the return of the appellee upon the grounds that the facts stated in said return do not justify the deportation of the appellant and are not sufficient to show cause why the appellant should not be discharged from detention by the appellee, that the return shows that the appellant was not accorded a fair hearing in that he was arbitrarily found to be unlawfully in the United States without any evidence justifying such finding, and that the order of the Secretary of Labor is and was without jurisdiction. This demurrer was overruled by the District Court, the writ of habeas corpus denied, and the appellant was thereupon remanded to the custody of the appellee. From this judgment, this appeal is prosecuted, and the question therefore presented on this appeal is whether or not the action of the Secretary was fair, regular and lawful, and whether or not the evidence taken before the appelled

and attached to the return and upon which the order of deportation by the Secretary of Labor is based, justifies the finding that the appellant is unlawfully in the United States in violation of the Chinese Exclusion Laws.

The evidence taken at the hearing before the appellee consisted on the part of the Government, solely of the examination of the appellant and of the so-called landing records of the appellant on which he was admitted.

This eviednce showed that the appellant first came to the United States on April 6, 1906, and was admitted at the port of San Francisco as a merchant bearing a Section 6 Certificate duly issued to him by J. G. Lay, Consul-General of the United States at Canton, China. (Tr. R. 92.) The certificate accredits the appellant with having been for the past eight years a member of a mercantile house in China with a capital of two thousand dollars (gold) therein invested, and recites that the Consular Agent has:

"made a thorough investigation of the statements contained in the foregoing certificate and have found them in all respects true."

That the intention of the appellant appears to have been

"to set up business as wholesale sundry goods shop at San Francisco," (Tr. R. 94).

And the Consul-General reports to the Commissioner of Immigration that:

"he intends going to San Francisco to establish a firm engaging in general merchandise business. He will take with him \$1,000.00 gold and will have \$3,000.00 sent him later by draft. His father is also known to have \$70,000.00, while the son's personal worth is \$50,000.00 Mexican." (Tr. R. 89-90.)

Immediately after the appellant's arrival at San Francisco the earthquake and fire destroyed that city and the appellant moved to Oakland for a year and a few months, (Tr. R. 42) where he procured medicines and Chinese herbs from the Doap Leun Hong store and sold them from house to house. (Tr. R. 42.) He became a partner in that store in July, 1908, investing therein the sum of Five Hundred Dollars brought with him from China, (Tr. R. 43) which interest he still retains. He became a salesman in that store, receiving a salary of four hundred dollars a year. (Tr. R. 44.)

On December 22, 1911, the appellant, deciding to return to China for a visit, made application to the Department for a pre-investigation of his status as a merchant. (Tr. R. 83-86.) This pre-investigation was made (Tr. R. 96-112) with the result that it was found:

"that he is and has been for more than a year last past a merchant as claimed," (Tr. R. 96-97.)

and his application was approved by the Commissioner in charge. (See the Commissioner's endorsement on bottom of application, Tr. R. 86.)

The appellant thereupon went to China, returning to the United States and again landing at the port of San Francisco, February 4, 1913, when (February 13, 1913) a Certificate of Identity as a merchant was issued to him. (Tr. R. 73-75.) The appellant stayed at the store of which he was a member until February, 1914, when he went to Phoenix and Mesa, Arizona, "looking for a location to open a store," at which latter place he was arrested upon the warrant of the Secretary issued. It is claimed by the Government, but denied by the appellant, that he became a waiter, laborer, at the latter place and was such when arrested. To support this claim the Government introduced in evidence at the hearing the ex parte statements of Sterling C. Robertson, (Tr. R. 54) and of Louis W. Lowenthal, (Tr. R. 56), both made without the presence of the appellant and prior to the issuance of the warrant, to the effect that they had seen the appellant at work in a restaurant at Mesa for three or four weeks. The appellant claims that the restaurant proprietor was a friend, that he went there on a visit, was not there employed, received no wages, but helped out when they were shorthanded and there was a rush in the business. The evidence for the appellant, independent of his own testimony, shows that he still was a member of the mercantile firm mentioned and was sent to Arizona by its manager as such member to there investigate business conditions and to arrange for agents to handle the goods of that firm and to establish a branch or branches. (Tr. R. 63-69.)

SPECIFICATIONS OF ERRORS.

T.

That the Court erred in overruling complainant's demurrer to the return filed herein by respondent to the writ of habeas corpus, based on the ground that the

facts stated in said return do not justify the detention of complainant by respondent and do not justify the deportation of complainant to the Republic of China by respondent and by the Secretary of Labor.

II.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the facts stated in said return are not sufficient to constitute a defense to the petition for a writ of habeas corpus filed herein, and are not sufficient to show cause why complainant should not be discharged from the detention by the respondent.

III.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the respondent and the Secretary of Labor did not accord to complainant a fair hearing in that they arbitrarily found complainant to be unlawfully in this country in violation of law without any evidence whatsoever having been introduced justifying such finding.

IV.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the detention by the respondent of the petitioner and the order of the Secretary of Labor in ordering the petitioner deported is and was without jurisdiction.

That the Court erred in denying the application of complainant for his discharge under the writ of habeas corpus, in discharging said writ, and in remanding complainant to the custody of respondent.

BRIEF OF THE ARGUMENT.

POINTS AND AUTHORITIES.

a. The action of the administrative officers of the United States, charged with the duty of investigating the status of the alien, determining the status of the alien as one of the exempt class and permitting him to enter the United States, is prima facie evidence of the alien's right to be and remain in the United States.

Lin Hop Fong vs. U. S., 209 U. S. 463. In re Tam Chung, 223 Fed. 801.

b. The alien's right to enter and remain in the United States, so determined by the administrative officers of the United States, in a proceeding of this character must be overcome by the United States and unless so overcome the alien's right to be and remain in the United States remains proved. (Sec. 3, Act May 5, 1892, casting upon the Chinese alien the burden of the proof. has no application to proceedings upon departmental warrant.)

Lin Hou Fong vs. United States, supra. Lew Ling Chong vs. United States, supra. U. S. vs. Lee Yon Wing, 211 Fed 941.

c. The evidence to overcome such prima facie right

so established must be substantial. Mere suspicion, fantastic doubt created, is not sufficient.

d. If in the absence of such substantial evidence the Secretary of Labor order the deportation of an alien such order is arbitrary and unfair, and subject to review and correction on an application for the writ of habeas corpus.

> Whitfield vs. Hanges, 222 Fed. 751. Ex parte Lam Pui, 217 Fed. 458. M'Donald vs. Sin Tak Sam, 225 Fed 710.

e. "One lawfully entering the United States can lawfully change his vocation and can labor of right and not of privilege and without incurring the penalty of deportation."

In re Tam Chung, 223 Fed. 803.

U. S. vs. Lew Chee, 224 Fed. 447, (C. C. A. 2nd C.)

U. S. vs. Foo Duck, 172 Fed. 856, C. C. A. oth C.)

Lew Ling Chong vs. U. S., 222 Fed. 196.

f. The warrant contains no allegation of a fact or facts advising the appellant of the charge against him, and did not, therefore, confer jurisdiction upon the Secretary, or invest the subsequent hearing with that fairness exacted by law necessary to constitute due process of law.

Whitfield vs. Hanges, 222 Fed. 748 (C. C. A. 8th C.).

Ex parte Lew Lin Shew, 217 Fed. 317.

g. The ex parte statements of Sterling C. Robertson and Louis W. Lowenthal should not have been received in evidence, and, the finding being based thereon, (Tr. R., bottom page 34 and top page 35) such finding

is vitiated by the reception and consideration of this improper evidence.

Whitfield vs. Hanges, supra. M'Donald vs. Sin Tak Sam, supra.

h. The proof offered to be legally sufficient must be "of such a character and volume that it might well satisfy a rational mind of the truth of the position it is introduced to maintain" and, in determining this, the Court must examine the proof with respect to both its quality and quantity.

Metropolitan R. R. Co. vs. Moore, 121 U. S. 568.

ARGUMENT.

The exempt status of the alien has been formally determined and approved by the administrative officials of the United States, charged with the duty of investigating such status, at least three times.

First,—on his original entry, April 6th, 1906, as a member of the exempt class.

Second,—on his application for pre-investigation as a member of the exempt class prior to his departure from the United States, the application being dated December 22nd, 1911, which was approved January 13th, 1912. This approval followed, as appears from the record, after an active, careful and close investigation by the officers charged with the duty of investigating his status.

Finally, the status of the alien must be deemed to have again been approved by the administrative officials on his return to the United States as a member of the exempt class.

That this alien was, at the time of his original entry, (April 6th, 1906), a merchant and member of the exempt class is conclusively shown by the evidence and only suspicion without valid reason can impugn his status.

Section Six of the Chinese Exclusion Act, under which he was admitted, requires, first, that the Chinese Government vouch for his status by issuing to him a certificate that he is a merchant, then the

"diplomatic representative or consular representative whose endorsement is so required is hereby empowered and it shall be his duty before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same."

It must be assumed that J. G. Lay, Consular Agent of the United States, who endorsed the certificate issued to this alien, performed his duty; that he examined "into the truth of the statements as set forth in said certificate" and only upon being satisfied of the truth thereof endorsed the same. This endorsement was made in 1906, the alien's status was then determined by the consular representative charged with the duty of investigation. Shall the propriety of such action of the consular representative be now, after the lapse of many years, questioned? Common justice, it would seem, requires at least sound reason for so doing.

The evidence in the case, the testimony of the alien himself is, that his father was the proprietor of the Yick Woh Drug Store in the Lin Teang Lee village, which is still owned by the family, (Tr. R. 40); that he, at the time of his application to the American Consul for a Section 6 Certificate, was a member of the Hop Lick Drug Store in which he had five thousand dollars invested. There is not a scintilla of evidence in the record to cast doubt upon these assertions, except suspision, based upon racial prejudice, to doubt in toto the assertions of Chinese aliens. If these statements made to the consular representative of the United States at the time of his application for a Section 6 Certificate were true his status as a member of the exempt class is clearly shown and his right to be and remain in the United States is absolute, the Government itself contending that in this preceeding the legality or illegality of the original entry is the sole issue. This Court is asked to declare at this late day that the alien in 1906 was not a merchant, a member of the exempt class, and that the investigation required by law of the consular representative of the United States should have shown that the statements of the alien to the consular agent were untrue.

"When this young man entered a port of the United States in July, 1899, he presented such certificate duly issued and vised by the consular representative of the United States. Upon application for admission this certification is prima facie evidence of the facts set forth therein. 22 Stat. at L. 58, * 6, Chap. 126, U. S. Comp. Stat. 1901, p. 1307; 33 Stat. at L. 428, Chap. 1630. This cer-

tificate is the method which the two countries contracted in the treaty should establish a right of admission of students and others of the excepted class into the United States, and certainly it ought to be entitled to some weight in determining the rights of the one thus admitted. While this certificate may be overcome by proper evidence, and may not have the effect of judicial determination, yet, being made in conformity to the treaty, and upon it the Chinaman having been duly admitted to a residence in this country, he cannot be deported, as in this case, because of wrongfully entering the United States upon a fraudulent certificate, unless there is some competent evidence to overcome the legal effect of the certificate."

Liu Hop Fong v. United States, 209 U. S. 463.

If he was a member of the exempt class his entry was lawful, and if he engaged in manual labor subsequent to his entry such latter fact could only raise a presumption that in truth he was not a member of the exempt class, and, that the Section 6 Certificate was obtained by fraud.

Now, what manual labor did he engage in after his entry and under what circumstances? The facts deny credence to such presumption, the executive findings are to the contrary and do not allow the inference of the presumption. He entered the United States April 6th, 1906, at San Francisco, to establish a store at San Francisco. Immediately thereafter the fire and earthquake occurred in San Francisco and the catastrophe hit hardest that section of San Francisco known as Chinatown. The alien moved to Oakland, where for a time he sold Chinese medicines from the Doap Leun Hong Drug

Store. In July, 1908, he became a member of that firm and ever since has been a member of the firm retaining his membership in the firm, though since his return from China in 1913 he has not been an active member. He paid five hundred dollars for his interest in the firm with money by him brought from China. That the alien brought money with him from China is borne out by the landing record of the officers. Prior to his return to China he was an active partner in the store, a salesman, not engaged in manual labor except that which was necessarily incident to his duty as a merchant. He was an active member of the firm on December 22nd, 1911, when he made an application for pre-investigation on his departure from the United States to the Immigration Inspector in charge.

This pre-investigation is provided for by Rule 15 of the Department of Labor governing the admission of Chinese which provides, substantially:

"Any Chinese Merchant * * * who desires to go abroad temporarily, may make written application to the Immigration Official * * for pre-investigation of his claim of being a merchant within the meaning of the law.

The officer to whom said application is made shall examine the applicant, such witnesses as he may produce, and such other witnesses as may be necessary * * and shall take such other steps as may be necessary and proper to determine whether the applicant's claim is true."

The officer making such investigation forwards the application with a transcript of the testimony to the Immigration officer in charge at the port which latter official

"shall, upon the receipt of the papers * * return to the officer from whom received the triplicate copy of the application, placing thereon a statement as to whether or not he is satisfied on the evidence presented, to indorse the application favorably."

If such pre-investigation is favorable to the alien the original application is delivered to him and upon his return to the United States is presented to the Immigration officials,

"and if the officer in charge is satisfied of the identity of such person and nothing has occurred during his absence to discredit the evidence taken on the pre-investigation he shall be promptly admitted without further examination or investigation, except to ascertain from the applicant whether the statutory ground for admission still exists."

(See Rule 15.)

It appears that the pre-investigation prescribed by Bule 15 was most thorough. The Court will take judicial knowledge of the fact that the Chinese aliens are an object of special solicitude by the Chinese Inspectors, that little, if anything, transpires which is not known to the Chinese Inspectors. That the alien in question was well known to the Chinese Inspectors at San Francisco certainly must be true. His conduct in the United States before his departure was not of a clandestine nature. His application for pre-investigation was accompanied by the giving of the names of three white witnesses in support of his claim as a merchant, in addition to the affidavit of the manager of the store of which the alien was a member, which affidavit gave in detail the names of the members of the firm and their investments.

It appears from the Landing Record admitted as an Exhibit that a most thorough departmental investigation was made at that time by the Immigration Officials, (Tr. R. 96 to 112) with the result that on January 13th, 1912, the Commissioner of Immigration in charge endorsed the application for pre-investigation as follows:

"Port of San Francisco, January 13th, 1912, respectfully returned to the Commissioner of Immigration, Port of San Francisco, Chinese and Immigrant Inspector, with the information that I am now prepared on the basis of the evidence submitted with the original of this application to approve said application.

(Signed) Samuel W. Backus, Commissioner or Inspector in Charge." (Tr. R. 86)

The Landing Record also shows the report of the Chinese Inspector under date of January 12th, which appears to have been an independent investigation by this Inspector and on the strength of which no doubt the commissioner in charge acted in part. (Tr. R. 96) Shall these thorough investigations, which are evidence, and the findings of the officers charged by law with the duty of investigating and determining, now stand for naught? To cast the findings aside must of necessity cast aspersion either upon the fidelity and integrity or upon the ability of the then Immigration Officials.

The law does not so contemplate, but on the contrary accords full credit to these quasi-judicial investigations of the officials, to be ignored in subsequent proceedings only when shown to have been clearly erroneous or obtained by the fraud of the alien.

"If he was unlawfully within the country in 1910, it was the duty of the officials of the government to have taken steps at that time to have him arrested and deported. The fact that during this long period of inaction the government made no move against him implies a lack of confidence in its case. We are also inclined to attach some importance to the fact that the defendant voluntarily applied to the government officials in 1910 for a certificate to establish his status as a merchant. It is extremely doubtful whether he would have ventured to make such application if he had entertained a doubt as to his ability to establish the facts necessary to sustain his application, with the danger of deportation threatening him if he brought the matter to the attention of the government and failed to secure the certificate."

U. S. vs. Lee Yon Wing, 211 Fed. 941.

Such was the status of the alien upon his departure from the United States at the time of his pre-investigation and upon his return from China on February 4th, 1013. Has his conduct since that date been such as to justify the inference that he was a laborer at the time of his original entry in 1906? We think not. What is there in the evidence to justify such an inference? He remained in San Francisco in the Doap Leun Hong store, under the eyes of the Chinese Inspectors, until February, 1914, three weeks before his arrest, when he came to Phoenix for the purpose of opening a store. Cast all the doubt you please upon the testimony of the alien himself or upon that of the witnesses by him produced, you are not justified in wholly ignoring his evidencé. Such doubt can only be resolved into a judicial finding, whether of a Court or of a Departmental

Official, when borne out by some concrete matter of substance in the record. You cannot ignore the evidence favorable to the alien but must accept the same even if only as an explanation of his conduct.

The testimony of the alien is that he came to Phoenix for the purpose of opening a branch store of the Doap Leun Hong Company, the evidence in support thereof, admitted by the affidavits of Ong Seen, the manager of that firm, fully bears out this contention. You are not here concerned with a chinese laborer sought to be deported, who is grabbing at the proverbial straw and pressing a vague claim as a member of the exempt class, but you are confronted with an alien of substance who has been in the United States with the consent and approval of the officials of the United States charged with the duty of investigating him, and admitting or deporting him as the facts might warrant since 1906.

Under these circumstances we do not ask this Court to weigh the evidence, but we do ask this Court in the light of all the evidence, in the light of past actions of the departmental officers, in the light of the law which permitted the merchant to labor and not lose his status if through stress of circumstances he is forced to labor, to examine the record and determine whether or not there is *substantial evidence* in the record sustaining the claim that in 1906 on the day of his original entry the alien was not a member of the exempt class.

Departmental process may warrant the crucifixion of the alien upon, what would in law be deemed, a cross

of errors, but he may not be hung to the tree of suspicion.

At the argument below the trial Court asked what the earthquake and fire at San Francisco had to do with the alien becoming a laborer, we answered and argue here, how many white merchants became laborers, at least for a time, through that cataclysm? As has already been stated, it is well known that that part of San Francisco known as Chinatown was practically destroyed. At the time of his entry the alien had means, this is shown not only by his own evidence but by matter contained in the Government's Landing Record. The alien came to San Francisco, within a few days all opportunity for mercantile endeavor was for a time taken away. He moved to Oakland and sold Chinese medicines. The interpreter used the word "peddler," perhaps truly, but we are not here concerned with his calling after his entry except as evidence to justify the inference that he was not a merchant at the time of his entry. If lawfully admitted as a merchant and impoverished, or opportunity to trade taken away, he might perform the labor of a coolie and not be subject to deportation.

His conduct of nine years ago is questioned. This conduct must have been known to and was affirmatively approved by the Immigration Department at San Francisco. Time and acquiescence must not be denied their probative force.

We earnestly contend that the entire proceedings are invalid because the warrant of arrest, which may be denominated the pleading, did not advise the appellant of the nature of the charge against him; and, that the finding is invalid because based upon ex parte statements of persons made prior to the issuance of the warrant.

"An alien, as well as a citizen, is protected by the prohibition of deprivation of life, liberty, or property without due process and the equal protection of the law. This principle is universal. It applies "to all persons within the territorial limits of the United States without regard to any differences of race, of color, or of nationality." Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; U. S. Rev. St. paragraph 1977 (2 Comp. Stat. 1913, paragraph 3925.)

"An alien is entitled to a hearing upon a decision of the charge that he has violated the Acts of Congress and is therfore liable to deprivation of his liberty and deportation, according to "the fundamental principles that inhere in due process of

law."

"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it."

Whitfield v. Hanges, 222 Fed. 748-749. See also: M'Donald v. Sin Tak Sam, 225 Fed. 710.

"The statement in the warrant of deportation that he is unlawfully in this country in that he has been found therein in violation of the Chinese Exclusion Laws, is so broad as to convey absolutely no idea of the specific reason for which the alien has been ordered deported."

Ex parte Lew Lin Shew, 217 Fed. 317.

Respectfully submitted,

STRUCKMEYER and JENCKES,
Attorneys for the Appellant.

NO. 2714

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ONG SEEN, Alias ONG CHONG LUNG,

Appellant.

vs.

ALFRED E. BURNETT, Inspector in Charge,
United States Immigration Service at Tucson,
Arizona,
Appellee.

BRIEF OF APPELLEE

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Counsel for Appellee.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ONG SEEN, Alias ONG CHONG LUNG, Appellant.

vs.

ALFRED E. BURNETT, Inspeltor in Charge,
United States Immigration Service at Tucson,
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Appellee.

This is an appeal from an order of the District Court of the United States for the District of Arizona, remanding the petitioner to the custody of the Immigration officers. The petitioner had been ordered deported under departmental proceedings, and the warrant for deportation had been issued by the Secretary of Labor. Thereupon the petitioner sued out a writ of habeas corpus, and, upon hearing, was ordered remanded to the custody of the Inspector in Charge at Tucson, Arizona. In his return to the writ of habeas corpus the respondent annexed a full transcript of the proceedings had in the department and made the same a part of his return. All the evidence, therefore, upon which the Secretary of Labor acted in ordering the deportation and in issuing his warrant therefor is contained in the return.

STATEMENT OF FACTS

The appellant is an alien, a native of China, and of the Chinese race. He came to the United States from China and arrived at the port of San Francisco, California, on SS. "America Maru" April 8, 1906 (Transcript of Record, p. 95). At that time he presented as evidence of his right to come into this country a certificate issued to him as a merchant under Section 6 of the Act of Congress of July 5, 1884 (Transcript of Record, p. 92). This certificate was issued to the appellant in the name of Tang San, and represented him to be a merchant, dealing in metals, and a member of the firm of Hop Yick Loong at a certain designated point in China, for a period of eight years, and as having a two thousand-dollar (gold) interest in that firm.

The American Consul-General at Canton, China, on February 23, 1906, addressed a letter (Transcript of Record, p. 89) to the Commissioner of Immigration at San Francisco, California, advising, among other things, that he had on that date visaed the section-six certificate of Tang San and that Tang San would take with him a thousand dollars gold and would have three thousand sent him later by draft; that Tang San's father was known to have seventy thousand dollars, while the son's personal worth was fifty thousand dollars Mexican. The Consul-General apparently bases his statements upon letters received by him from Man Chun Yuen and Shing Hing (Transcript of Record, pp. 93-94). This Shing Hing, in his letter to the Consul-General on February 19, 1906, stated that "Tang Shan (San) is going to set up as wholesale sundry goods shop in San Francisco. We guarantee that all his statements are true." Upon this showing the applicant (the appellant in this case) was landed by the appropriate Immigration officer at San Francisco (Transcript of Record, p. 25). From the time of his arrival on April 6, 1906,

until January 23, 1912, appellant resided in San Francisco and Oakland, California (Transcript of Record, p. 42). Almost immediately after his arrival in the United States, appellant became a peddler of Chinese herbs, "taking them about from house to house for sale," and continued in that occupation for a period of four years (Transcript of Record, p. 42). These herbs he bought in small quantites and peddled them from house to house (Transcript of Record, p. 43). In July, 1908 (more than two years after his arrival), he invested five hundred dollars in the Doap Leun Hong Drug Store at 844 Dupont Street, San Francisco (Transcript of Record, pp. 42-43). He did not become an active member of the firm until S. T. 2/10/1 (November 1, 1910) (Transcript of Record, p. 104). Appellant claims that he still retains that five hundred-dollar interest in the firm, but has never received any dividends from that investment (p. 46). The investment has never produced him a living, but he has "made money by peddling (Transcript of Record, p. 47). He has no interest in any other mercantile establishment (Transcript of Record, p. 47). This firm has a capital stock of \$28,500 held by fiftythree members (Transcript of Record, pp. 104-105). On December 22, 1911, appellant made application to the Immigration officers at San Francisco, California, for preinvestigation of status as a lawfully domiciled Chinese merchant (Transcript of Record, p. 84). The application was approved and the appellant departed from the country January 23, 1912 (Transcript of Record, p. 93 and p. 86). From this trip appellant returned to the port of San Francisco on SS. "Mongolia" February 4, 1913 (Transcript of Record, pp. 44 and 73), and was admitted by the Commissioner of Immigration at San Francisco, California, who issued to the appellant certificate of identity No. 10761 (Transcript of Record, p. 73). Following this admission, appellant promptly returned to his old occupation as a

peddler of herbs and continued in that employment for about one year (Transcript of Record, p. 45), at the end of which time he left San Francisco (February 28, 1914) for Phoenix, Arizona (Transcript of Record, p. 47). He remained in Phoenix but a few days and then proceeded to Mesa, Arizona, where he made the Arizona restaurant his headquarters (Transcript of Record, p. 47). Appellant alleges that he came to Arizona looking for a location for a business, but has no money in hand nor in bank, and no one owes him any money (Transcript of Record, p. 47). "If I find a suitable location I could borrow and start a store" (Transcript of Record, p. 48). This appellant arrived in Phoenix March, 2, 1914, and on March 6, 14, 18, and 27, 1914, was seen working in a restaurant at Mesa, Arizona, by Inspector Robertson (Transcript of Record, To Thomas G. Peyton, City Marshal of Mesa, this appellant appeared to be a regular employee of the Arizona Restaurant for a period of three or four weeks prior to March 29, 1914 (Transcript of Record, pp. 56 and 57).

Following an investigation by the officers of the Immigration Service, the Acting Secretary of Labor, on the 16th day of April, 1914, issued his warrant for the arrest of the appellant in this case, directing that he be granted a hearing to enable him to show cause why he should not be deported in conformity with law (Transcript of Record. pp. 70-71). Pursuant to said order the appellant was accorded a hearing before the appellee in the City of Tucson on the 23d day of April, 1914, said hearing being continued from day to day and concluded on May 5, 1914 (Transcript of Record, pp. 36-83). Throughout said hearing and at every session thereof, the appellant was represented by counsel of his own selection (Transcript of Record, pp. 36-83). A full and complete transcript of said hearing and the proceedings and the evidence had thereat was thereafter transmitted (through official channels)

to the Secretary of Labor (Transcript of Record, pp. 33-35). Thereafter, upon due consideration of said evidence and proceedings, the Secretary of Labor did, on the 28th day of May, 1914, issue his warrant for the deportation of appellant (Transcript of Record, pp. 32-33), assigning as the ground for his order of deportation: "That the said alien is unlawfully within the United States, in that he has been found therein in violation of the Chinese-exclusion laws and is, therefore, subject to deportation under the provisions of Section 21 of the above-mentionedh Act (Act of Congress approved February 20, 1907, amended by the Act approved March 25, 1910), and may be deported in accordance therewith."

ARGUMENT

I.

THE APPELLANT WAS UNLAWFULLY IN THIS COUNTRY BECAUSE HE BECAME A LABORER IMMEDIATELY AFTER HIS ARRIVAL.

It appears from the appellant's own testimony taken before the Immigration Inspector at Phoenix, Arizona, on March 29, 1914, that soon after he landed in the United States, he commenced to follow the oicupation of a peddler of Chinese herbs. He testified:

- "Q. Where did you go to live immediately upon your arrival in April, 1906?
- A. Immediately after I landed the fire and earthquake occurred in San Francisco and I stayed in San Francisco some time after that.
 - Q. How long?
- A. Until I went to China S. T.3/12/6 (January 23, 1912).

* * * * * * *

Q. Didn't you live in Oakland or in near-by towns?

- A. I moved over to Oakland after the fire for a year and a few months.
- Q. What did you do during that year and few months?
- A. I procured some Chinese medicines from the Doap Leun Hong Drug Store and peddled them.
- Q. Taking them about from house to house for sale?
 - A. Yes.
 - Q. Were those medicines Chinese herbs?
 - A. Yes.
- Q. How long did you follow that business in Oakland and vicinity?
 - A. About four years.
- Q. Did you peddle those herbs in Oakland all the time or did you include other towns in your itinerary?
 - A. San Francisco and Oakland.
- Q. Where did you make your headquarters during those four years?
- A. I made my headquarters in the Doap Leun Hong Drug Store.

* * * * * * *

Q. During those four years did you just buy those Chinese herbs in small quantities and peddle them from house to house?

A. Yes."

(Transcript of Record, pp. 41, 42, and 43.)

It thus appears that almost immediately after his arrival, the appellant became a peddler and followed that occupation for at least a year or two following his arrival.

The Act of Congress of November 3, 1893 (28 Statutes at Large, Chapter XIV) defines or specifies certain occupations which those following are deemed laborers. Among those occupations is that of peddler, and a peddler is there

expressly declared to be a laborer within the meaning of the Chinese-exclusion Acts.

> United States vs. Mark Ying, 76 Fed. 450. Cheung Him Nin vs. United States, 133 Fed. 391.

A peddler going from house to house selling merchandise to whomsoever might desire to purchase might, in the absence of an Act of Congress defining the term "laborer" be deemed a merchant, or his calling might be deemed to partake to some extent of a mercantile character, and it was the intent of Congress to so define the term "laborer" as to exclude peddlers from the privileges granted to merchants.

Lee Ah Yin vs. United States, 116 Fed. 614.

In that case, which was decided by this Court, it said: "The occupation of mining, taking fish for the purpose of selling the same, peddling, operating a laundry, etc., partake of some of the characteristics of the occupation of a merchant, and those engaged therein may, in a sense, be deemed merchants. Evidently, it was to define these specific occupations and to declare that the persons engaged therein are not merchants that the act was so adopted." (Italics ours.)

The evidence taken at the warrant hearing before the Immigration authorities showed that the appellant entered this country under what is commonly called in immigration parlance "a section-six merchant's certificate." As shown by the Kestimony above quoted, he almost immediately entered upon the business of peddling Chinese herbs from houses to house and continued that occupation for nearly four years. For at least two years he did not acquire any interest in any mercantile establishment, for he testified, "I did not become a partner in that drug store until K. S. 34, sixth month" (July, 1908). For over two years, therefore, his sole occupation was that of a peddler, or, within the definition of the Act of Congress, a laborer.

He comes, therefore, within that numerous class of cases holding that one who comes as a merchant and within a short time becomes a laborer, is subject to deportation.

Chain Chio Fong vs. United States, 133 Fed. 154.
Chueng Him Nin vs. United States, 133 Fed. 391.
United States vs. Yong You, 83 Fed. 832.
United States vs. Foo Duck, 172 Fed. 856 at 858.

On who enters the United States as a merchant under certificate issued under Section Six of the Act of Congress above referred to, may lawfully enter only for the purpose of conducting business as a merchant. However correct in form or substance the certificate entitling him to admission as a merchant may be, the apparent right conferred by it may be overcome by circumstances showing that he did not intend to become a merchant, but, in reality, to become a laborer; and the most persuasive evidence of such intent is the fact that he did immediately or within a short time actually become a laborer. This doctrine is set forth with great clearness by Judge Adams, afterwards Circuit Judge of the Eighth Circuit, in U. S. vs. Yong You, 83 Fed. 832.

And in another case arising in the Northern District of California, it was held that the effect of the section-six certificate was overcome by evidence showing that the defendant soon after landing engaged in manual labor.

United States vs. Ng Park Pan, 86 Fed. 805.

Much was said, upon the argument of this case before the District Court, upon the idea that the appellant landed in San Francisco immediately before the fire and earthquake of April, 1906, and was, therefore, prevented from carrying out his original intention of entering upon a mercantile business; hence, was compelled to pursue the calling of a peddler. It would probably be sufficient to say that no such exception is allowed by the statute. But the

facts do not warrant the taking into consideration of any such idea. The appellant landed in San Francisco a complete stranger. He had made no arrangements for entering into business at any particular place. He had formed no business relations with anyone in this country. He was not limited in his choice of a business location to San Francisco or any other particular place. All of California, and, in fact, all of the United States was open to him for the establishment of a mercantile business had he desired to do so. No reason existed why, if it was his intention to become a partner in a drug store, he could not have acquired the interest in the drug store at Oakland, which he claimed subsequently to have acquired. An established merchant whose business was destroyed by that catastrophe might claim with some justice that he was compelled thereby to temporarily enter upon some other occupation and such misfortune would appeal to the sympathy of the court. But, in this case, the appellant landed only a few days before the earthquake; with no preparation prior to his arrival, to enter in business at any particular place, with no such arrangement made after his arrival, with abundant opportunity, if he had the means and the disposition to do so, to establish himself in the mercantile business at any place he saw fit, he deliberately entered upon a calling which Congress has classed as "labor," and, finally, now claims membership in the exempt classes by reason of a mercantile status acquired by the purchase of an interest in a mercantile establishment not in San Francisco, but in another city which was unharmed by the earthquake. It is submitted, therefore, that the appellant's residence in San Francisco after his landing and during the period that he pursued the calling of a peddler, was unlawful and that he might lawfully have been deported at any time during that period.

THE SECTION-SIX CERTIFICATE UPON WHICH THE APPELLANT WAS ORIGINALLY ADMITTED TO THIS COUNTRY WAS PROCURED BY FALSE REPRESENTATIONS.

Certain letters appear in the record addressed to the United States Consul-General at Canton, China, with respect to the appellant and the extent of his interest in a mercantile establishment in China. Basing his statements, apparently, upon these letters, the Consul-General on February 23, 1906, addressed a communication to the Commissioner of Immigration at San Francisco, California, in which he stated that the appellant would take with him one thusand dollars gold and would have three thousand dollars sent him by draft; that the appellant's father was known to be worth seventy thousand dollars, while the son's (appellant's) personal worth was fifty thousand dollars Mexican (Transcript of Record, p. 89). In his testimony, the appellant states that he was only a silent partner in the firm of Hop Yick Loong, and only took an active part in conducting the business of that company for a little while as a salesman (Transcript of Rec ord, p. 53). He testifies that his father was engaged in running a small drug store in China, the value of which was approximately two thousand dollars (Transcript of Record, pp. 40 and 41). Though he claimed to have considerable interest in the Hop Yick Loong store in China, he was unable to remember how long he had been interested in that firm until he had ascertained the number of years stated in the certificate (Transcript of Record, p. 52) He is unable to remember how much money he brought to the United States when he landed the first time, and was unable to give a better answer than to say that he did not take note of it (Transcript of Record, p. 58). But the best evidence that he did not have sufficient means to enter upon the mercantile business is that he did not, in fact, enter upon such business, and that he immediately entered upon the precarious occupation of a house to house peddler of Chinese herbs. It would thus appear that the Consul-General, in issuing the certificate, was misled by the statements contained in the letters addressed to him, as appears in the record, or by some other statements, and accorded to the appellant a high commercial and financial standing which the facts did not warrant; and, had the Consul-General known the actual facts as disclosed by the testimony of the appellant given on the hearing involved in this case, in all probability no such certificate would ever have been issued.

Section-six certificates have always been construed with the utmost strictness, and the most full and complete statements required to be made in them, and a certificate not strictly conforming to the requirements does not entitle the owner to remain in the United States.

> United States vs. Pin Quan, 100 Fed. 509. Cheung Pang vs. United States, 133 Fed. 392.

III.

THE PREINVESTIGATION AND SUBSEQUENT PERMISSION TO LAND UPON RETURN ARE OF NO EFFECT.

Much was said in the argument before the court below of the supposed effect of the preinvestigation of appellant's alleged status as a merchant and the permission given him to enter the United States and the certificate of identity issued to him upon his return.

The so-called preinvestigation was made under Rule 15 of the Regulations of the Department of Labor governing the admission of Chinese. This proceeding is designed to

facilitate the return of Chinese merchants or other exempt Chinese who desire to go abroad temporarily. Its utmost effect, and its only purpose, is, in the language of the rule itself, "to avoid delay in securing admission upon return." Neither the admission upon return, nor the certificate of identity, amounts to an adjudication of the right of the alien to enter. The certificate of identity is no more than what it purports to be, a mere statement that the person to whom the certificate is issued is the same person who had previously departed for China. That such a certificate is no obstacle in the way of deporting a Chinaman, if he were not entitled to admission, has been repeatedly held.

Low Quan Wo vs. the United States, 184 Fed. 485. 68
Pearson vs. Williams, 202 U. S. 281.
Li Sing vs. U. S., 180 U. S. 486.

And see, also, the elaborate discussion of this proposition by Judge Rose, of the District of Maryland, in

Ex parte Wing Yee Toon, 237 Fed. 247.

All the authorities hold that the admission of a Chinaman, or, for that matter, any alien, whatever may be its effect, does not prevent his subsequent expulsion from the country, if the facts show that he was not entitled to admission.

In this case the facts are entirely undisputed. As previously argued, the appellant was wrongfully in this country, and could, and, it is respectfully submitted, should have been deported prior to his departure for China and prior to the so-called preinvestigation. Being so subject to deportation, because he was here in violation of the Chinese-exclusion Act, he acquired no new status and had added nothing in the way of right to enter this country by the preinvestigation and his subsequent departure and return.

If anything were needed to show that the so-called preinvestigation and subsequent proceedings amounted to nothing in the way of raising a presumption in favor of the alien or the shifting of the burden of proof, it will be found in a reading of the testimony taken on the so-called preinvestigation. The perfunctory and apparently routine character of this proceeding; the character of questions propounded; the answers of witnesses, which largely consist of either conclusions or opinions—demonstrate that no such effect as may be claimed, and was claimed in the court below, should be given to this proceeding. To hold that such a proceeding should have any effect even upon the burden of proof or the quantum of proof, as against the assertion of the Government that the alien is wrongfully in the United States, would be contrary, not only to the decisions upon the subject, but to reason, based upon the character of the proceeding itself.

The whole object of the proceeding is merely to facilitate and avoid delay in the landing of the alien upon his return after a temporary absence. It has nothing to do with his original status or the rightfulness of his original entry. It is an exparte proceeding, looking to the determination of the then existing status of the alien, and done merely for the purpose of establishing the identity of the person returning with the person departing, and to facilitate and avoid delay in his landing.

Hom Yuen vs. United States, 214 Fed. 57.

Immigration officials have no power to estop the Government from questioning the rightfulness of either the original or the subsequent entry, and their action has no such effect.

Counsel in the court below dwelt with great earnestness on the case of United States vs. Hom Lim (214 Fed. 456), and particularly on that portion of the opinion of the court relating to the case of the United States vs. Quan Wah, in which the court said, speaking of the necessity

Gibray vs. United States,

of proof to over come the presumption arising from the admission of a Chinese alien: "The decision as to the right to enter was presumptively correct, and, unless the United States shows persuasively to the contrary, the mere certificate of admission is sufficient." This opinion was by Judge Chatfield, of the Eastern District of New York, and covered seriatim a number of Chinese deportation cases then pending before him. Each of these cases was subsequently appealed by the Government to the Circuit Court of Appeals for the Second Circuit. In the first cases decided by the latter court, the judgment of the District Court was reversed, the Court taking an entirely different view, both of the construction of the statute, and the effect of it, from that entertained by the District Court, and remarked that it was quite apparent from the record that the disposition of the case in the District Court was made on the theory that the Government had the burden 2.23 of proof.

United States vs. Hom Lim, 239 Fed. 520.

Later the particular case with reference to which the language above quoted was used, was passed upon by the Circuit Court of Appeals, and the judgment in that case was reversed.

United States vs. Quan Wah, 224 Fed. 420.

But, whatever might be said as to the burden of proof, or whatever effect may be given to either the original section-six certificate or to the preinvestigation proceedings and the subsequent admission and certificate of identity, it is obvious that these may be overcome by proof that, in fact, the alien was subject to deportation. And in this case the undisputed evidence, consisting principally of the alien's own testimony, shows that immediately after his first arrival in the United States he became a laborer and so remianed for at least two years; that he then ac-

quired, or claimed to have acquired, a five hundred-dollar interest in a Chinese drug store in which there were fifty-four partners besides himself, from which he has never received any income or dividend upon his investment, and in which he claims to have served a short time as a salesman. After his departure for China and return to the United States, he again resumed his status of a laborer. He testifies with respect to his conduct immediately upon his last arrival:

- "Q. Where did you go immediately after landing in February, 1913?
 - A. Doap Lung Hing drug store.
 - Q. For how long did you live there?
 - A. Until I came to Arizona about three weeks ago.
- Q. That would be something over a year, wouldn't it?
 - A. Yes
 - Q. What did you do during that year?
- A. I got some drugs from my drug store and peddled them from place to place.
 - Q. Chinese herbs exclusively?
 - A. Yes.
- Q. In other wards, you went back to your old job as a peddler?
 - A. Yes."

(Transcript of Record, p. 45.)

Again, he testifies:

- "Q. How much money did you have when you returned from China in February, 1913?
 - A. Just a little money for expenses." (Transcript of Record, p. 51.)

Upon his arrival in Arizona he immediately went to a Chinese restaurant in Mesa. While he strongly denies that he was regularly employed in that restaurant, he admits that he did some work, and the testimony of Mr. Robertson (Transcript of Record, pp. 54 and 55) and of Mr. Peyton (Transcript of Record, pp. 56 and 57) tends strongly to show that he was actually engaged as a laborer in that restaurant. Sufficient evidence, at least, was presented to warrant a finding by the Immigration officers that he was, in fact, a laborer in a restaurant at the time of his arrest, and for some time previously had been.

Again, the alien testifies:

- "Q. You say you came to Arizona looking for a location for a business without money?
- A. If I found a suitable location I could borrow and start a store."

What had become of the one thousand dollars which he proposed to bring with him on his first landing, or the three thousand dollars that was to follow by draft, is wholly unexplained. What had become of the five thousand-dollar interest in the metal store in China, or the fifty thousand dollars Mexican which he led the Consul-General at Canton to believe he possessed, is likewise without explanation. Why, instead of availing himself of these resources, if they actually existed, he chose to make a living by peddling Chinese herbs, or, as he claims, by working for his board in a restaurant in Arizona, is not apparent from anything contained in the record. But the fact is that it takes no reading between the lines, and no very strained inference to one acquainted with these Chinese cases, to show that the actual truth is that he came here as a laborer in the first instance; that he obtained his section-six certificate by deception; that he had no intention of becoming a merchant, and no means with which to become one if he had such intention. is, and always has been, a laborer pure and simple, and if a case can be presented which will justify deportation it would seem that one is here presented.

IV.

ONE UNLAWFULLY IN THE UNITED STATES MAY NOT SUBSEQUENTLY ACQUIRE AN EXEMPT STATUS AND THEREBY ENTITLE HIMSELY TO REMAIN.

The Chinese-exclusion Acts apply as well to one who has once been in this country and returned to China, as to one seeking admission in the first instance.

Li Mon vs. United States, 66 Fed. 955.

And it has been held by this Court that one who has unlawfully in the United States may not change his status and assume that of the privileged classes, and thereby become entitled to remain in this country. As it was said by this Court, "When, however, that domicile (in the Uniter States) has been acquired contrary to, and in violation of, the laws of the United States, and when, as here, it is only through an unlawful entry into the United States that the Chinese person has secured residence in this country, they cannot purge themselves of their offenses by assuming the occupation of members of the privileged class and establish their right to remain by proof of that character."

United States vs. Chew Chee, 93 Fed. 797.

V.

THE IMMIGRATION AUTHORITIES HAVE THE RIGHT TO DEPORT AN ALIEN MORE THAN THREE YEARS AFTER HIS FIRST ARRIVAL IN THE UNITED STATES BY DEPARTMENTAL PROCEEDINGS.

It has been settled that the three-year period within which the officials of the Department of Labor may act in

deporting an alien by departmental proceedings, applies to the last entry regardless of the time of the first.

Choy Gum vs. Backus, 223 Fed. 487. Bugajewictz vs. Adams, 228 U. S. 585. Lapina vs. Williams, 232 U. S. 78.

VI.

SECTION 21 OF THE IMMIGRATION ACT APPLIES TO ALIENS WHO ARE IN THIS COUNTRY IN VIOLATION OF THE CHINESE-EXCLUSION ACTS.

While this question was elaborately discussed in the court below, it is not thought necessary to make any extended argument in this Court. The question seems to be thoroughly settled. Counsel for the present appelled cited to the court below the following cases:

Ex parte Lam Pin, 217 Fed. 456.

U. S. ex rel. Hamm Pon vs. Sisson, 222 Fed. 693.

United States vs. Wong You, 223 U.S. 67.

In reality, it would seem that the whole question is settled by the case of the United States vs. Wong You. It is interesting to note, however, that this question has been considered by several Federal Courts since the decision of this case by the District Court, and the unanimous holding of the courts is as here argued.

Ex parte Lee Ying, 225 Fed. 335. Ex parte Woo Shing, 226 Fed. 141. Ex parte Chin Him, 227 Fed. 131.

VII.

THE APPELLANT WAS GIVEN A FAIR HEARING BEFORE THE IMMIGRATION OFFICERS.

What constitutes a fair hearing has been a subject of much discussion, especially in the opinions of several District Courts. In this circuit, however, the question has been fully considered and settled in the case of Choy Gum vs. Backus, 223 Fed. 487. Within the rules, as laid down in that decision, the hearing in this case was eminently fair. The petitioner was represented by counsel employed by him or in his behalf. Every opportunity was presented for the inspection of papers and records. Full opportunity was given to present any evidence that might be desired on behalf of the alien, and no evidence was excluded from consideration.

VIII.

THE EXTENT OF REVIEW OF HABEAS CORPUS.

This Court has had occasion to pass upon this question, and is so familiar with the authorities on the subject that again an extended argument would be of little aid to the Court. The only question that may be passed upon in a habeas corpus proceeding is the question whether the petitioner was given a fair hearing, and whether there was some evidence tending to support the decision of the Secretary of Labor. As to questions of fact, the findings of the Immigration authorities are final.

United States vs. Suekichi, 199 Fed. 750.

Ex parte Hudekuni Iwata, 219 Fed. 610.

United States vs. Jew Toy, 198 U. S. 256.

Chin Low vs. United States, 208 U. S. 8.

Low Wah Suey vs. Backus, 275 U. S. 460.

United States vs. Li Chong, 217 Fed. 45.

IX.

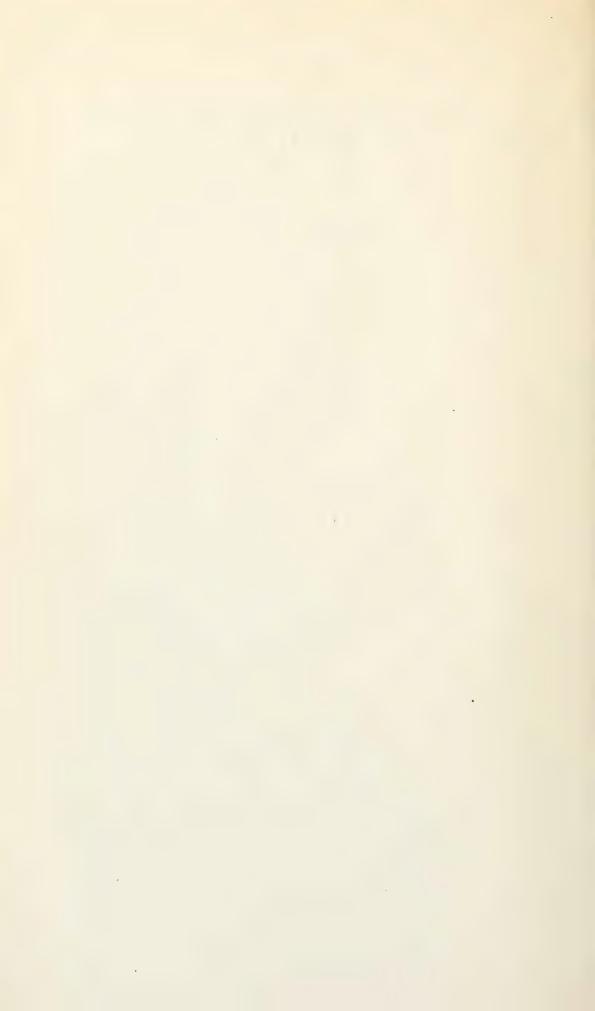
THIS CASE IS ONE IN WHICH THE ACTION OF THE SECRETARY OF LABOR CANNOT BE REVIEWED BY THE COURTS.

Conceding, as it must be, that neither the section-six certificate upon the appellant originally landed, nor the

preinvestigation proceedings, nor the certificate of identity, is conclusive of the right of the alien to remain in this country, what can the court pass upon in this case? Grant that all or any of those documents or proceedings amount to prima facie evidence of the right of the alien to remain, and then what. The prima facie effect may be overcome, and, if there is any evidence tending to overcome them, its effect and probative force is entirely for the Department of Labor and not for the courts. appellant was ordered deported because he was "unlawfully within the United States in that he has been found therein in violation of the Chinese exclusion laws." evidence abundantly support this finding. Had the appellant been proceeded against one year after his first arrival, the presumption created by his merchant's certificate would have been overcome by the proof appearing in this record that he had immediately become a laborer, and he would have been ordered deported. Were this court to review such a proceeding on appeal, after the same finding by a Commissioner and a District Court, under its repeated decisions, it would be unable to disturb the finding. The judgment would be affirmed because the evidence warranted a finding that the petitioner was unlawfully within the United States. Being unlawfully within the United States, he could not acquire a right to remain by assuming the status of one of an exempt class, even if full credence be given to his claim that he had acquired an interest in a mercantile establishment. Upon his second arrival, the appellant resumed the status of a laborer and followed no other calling up to the time of his arrest. These facts are all shown by the appellant's own testimony; they tend to justify the finding of the Secretary of Labor, and furnish evidence in support of such finding. That being the case, the power of the court to review the case on habeas corpus ends.

It is submitted that the order of the District Court remanding the petitioner should be affirmed.

THOMAS A. FLYNN,
United States Attorney.
SAMUEL L. PATTEE,
Assistant United States Attorney,
Counsel for Appellee.



No. 2714

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ONG SEEN, alias ONG CHUNG LUNG,

Appellant,

VS.

Alfred E. Burnett, Inspector in Charge, United States Immigration Office, at Tucson, Arizona,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

JOHN L. McNab,
STRUCKMEYER & JENCKES,
Humboldt Bank Building, San Francisco,
Attorneys for Appellant
and, Petition r.

JUN 5 - 1916

Filed this......day of June, 1916. F. D. Monckton,

FRANK D. MONCKTON, Clerk.

By Deputy Clerk.



IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Ong Seen, alias Ong Chung Lung,

Appellant,

VS.

ALFRED E. BURNETT, Inspector in Charge, United States Immigration Office, at Tucson, Arizona,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant, Ong Seen, alias Ong Chung Lung, respectfully petitions this Honorable Court to grant to him, the said apepllant, a rehearing upon the errors assigned in the above appeal and more particularly of the error assigned upon this appeal in the admission in evidence and consideration by the Secretary of Labor of the ex parte affidavits of Sterling C. Robertson and Louis W. Lowenthal.

And the said apepllant, by his counsel, of the alleged error so assigned, respectfully submits to this Honorable Court:

At the hearing, the ex parte affidavits of the two persons above named were put in evidence. These affidavits were to the effect that the appellant at the time of his arrest and for some time prior thereto had been a waiter and general helper in a Chinese restaurant at Mesa, Arizona, having been a regular employee of the restaurant. Upon these affidavits the finding that the appellant was and had been a waiter for some time prior to his arrest is based.

It is deemed by counsel for the appellant desirable that a uniform rule of procedure be established for the Ninth Circuit with reference to departmental hearings. It has been the custom of departmental officials in summary hearings to receive ex parte affidavits and upon such ex parte affidavits base their findings. To the end that a clear pronouncement of the law may be had from this Court which may thereafter guide the departmental officials as well as counsel for the aliens, this rehearing is sought.

If the reception in evidence of these ex parte affidavits referred to contravened a fundamental principle of our system of jurisprudence; if the reception in evidence of the affidavits was a denial of due process of law, then the hearing before the department was not a fair hearing.

The Circuit Court of Appeals for the Eighth Circuit in no doubtful language condemned the practice here adverted to and declared that the reception of ex parte affidavits at such a hearing was in effect a denial of due process of law and a denial of a fair hearing.

For the purpose of this petition, we can lend no force by argument to the decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of Whitfield v. Hanges, 222 Fed. 748-749, wherein it was held:

"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affeeted; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, crossexamine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it: that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it."

The rule laid down in that case by the Circuit Court of Appeals for the Eighth Circuit, has established what we consider to be the true rule of procedure with reference to departmental hearings, and excludes the reception of ex parte affidavits, the introduction and reception of which can not but be a denial of due process of law to defendants in this class of cases.

Excluding these ex parte affidavits from the record in this case, there is no evidence that appellant performed any manual labor. That the decision reached by the Department of Labor in ordering the deportation of appellant must have been based upon these affidavits, is borne out by the statement of the case recited in the opinion of this Court:

"In March, 1914, he was seen working in a restaurant where it appeared that he worked as an employee for a period of three or four weeks."

This did not appear from any evidence in the case except the ex parte affidavits above mentioned.

Stripped of that "evidence" there is no evidence in this case upon which the Commissioner of Labor could find that appellant was unlawfully in the United States. We respectfully submit that the conclusion reached by this Honorable Court as set forth in its opinion in this case that:

"There is evidence which we think might justify the Immigration officers in believing, as no doubt they did believe, that the appellant never in fact belonged to the merchant class",

is not borne out by the evidence presented in the record. The uncontroverted evidence is that appellant did become a merchant; that he was a bona fide member of the firm of Doap Leun Hong & Co., and that he was such for at least one year prior to his departure for China.

Appellant bases his right to remain in the United States not alone upon his original entry in 1906, but as well upon his subsequent entry in 1913. If the subsequent entry as well as the original one was lawful and appellant has not since the latter entry committed any act depriving him of the right to remain here acquired by reason of such entry, he can not now be deported as a penalty for the mere delay in entering upon his occupation of merchant after his original entry. That the original entry was a lawful one, there is no evidence to dispute. The mere delay on the part of appellant in taking up the occupation of merchant thereafter at most was only a circumstance upon which the Department of Labor might have sought to deport him at the time as being unlawfully in the United States because of what might be termed the non-user of the right accorded him by reason of the lawful entry, and it does not in any way controvert the fact that appellant did later become a bona fide merchant. So in the light of this analysis of the evidence it appears that the basis of the Commissioner's belief "that appellant never in fact belonged to the merchant class" was merely a suspicion engendered by the delay on the part of appellant in taking up his occupation as merchant.

Section 2 of the Act of 1893 provides, inter alia:

"Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than

Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

The evidence adduced by the Department itself all tends to prove that such entry was a lawful one, i. e., the preinvestigation of appellant's status as a merchant upon his departure for China in 1912, and the landing record upon his return in 1913, the former containing the testimony of three white witnesses, namely, H. A. Page, Daniel A. McNulty and B. M. Poetz, that appellant was engaged in a bona fide mercantile endeavor for at least one year prior thereto. That evidence established appellant's status as a merchant "for at least one year before his departure from the United States," and the record discloses nothing which even casts suspicion upon such status. We are not concerned with the question of whether a person unlawfully within the United States in the beginning can subsequently acquire a legal status which will entitle him to remain, for that question is not presented here. We are here concerned only with the question of a Chinese person being lawfully admitted to the United States subsequently acquiring a status which entitles him to remain, unless he has since committed some act which caused him to lose the status

thus acquired. Even a laborer, whose entry into the United States was not an unlawful one, although subsequently he may have lost his right to remain and might in the meantime be subject to deportation as being unlawfully within the United States, may subsequently acquire a status as a merchant which will give him the right to remain.

> Ex parte Ow Guen, 148 Fed. 926; Bouve, Exclusion and Expulsion of Aliens in the United States, 352.

That appellant was lawfully admitted to the United States and that while lawfully here he acquired a status as a merchant, the record in this case fully discloses, and that he was lawfully readmitted to the United States in 1913 upon his status as a merchant for at least one year prior to his departure for China in 1912, is also fully disclosed by the record. He must therefore be entitled to remain in the United States unless he has lost his status as a merchant subsequent to his return in 1913. That he has lost this status is only made to appear if at all by the ex parte affidavits complained of.

For this reason appellant contends that the alleged error of the admission in evidence and consideration by the Secretary of Labor of the exparte affidavits of Robertson and Lowenthal more clearly appears, and that because of such error appellant was not accorded a fair hearing upon the question of his right to remain in the United States.

Wherefore appellant respectfully urges a rehearing of his appeal herein by this Honorable Court.

Dated, San Francisco, June 5, 1916.

Respectfully submitted,

JOHN L. McNab,

STRUCKMEYER & JENCKES,

Attorneys for Appellant

and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

John L. McNab,

Of Counsel for Appellant

and Petitioner.

United States

Circuit Court of Appeals

For the Ninth Circuit.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record

Upon Writ of Error From the United States District Court for the District of Idaho, Eastern Division.



Uircuit Court of Appeals

For the Ninth Circuit.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record

Upon Writ of Error From the United States District Court for the District of Idaho, Eastern Division.



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Names and Addresses of Attorneys of Record.

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Attorneys for Plaintiff in Error.

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- J. R. SMEAD, Assistant United States Attorney for District of Idaho;
 Boise, Idaho;

Attorneys for Defendant in Error.

In the District Court of the United States for the District of Idaho, Eastern Division.

2800.

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

COMPLAINT.

Now comes the United States of America, by James L. McClear, United States Attorney for the District of Idaho, and brings this action on behalf of the United States against the Oregon Short Line Railroad Company, a corporation organized and doing business under the laws of the State of Utah, and having an office and place of business at Shelley, in the State of Idaho; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by

limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 2, 1915, at its office and station at Shelley, in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: A. R. Weston, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: From said hour of 7:00 o'clock A. M. on said date, to the hour of 8:00 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to the plaintiff in the sum of five hundred dollars.

FOR A SECOND CAUSE OF ACTION

plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,"

approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 3, 1915, at its office and station at Shelley, in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: A. R. Weston, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: From said hour of 7:00 o'clock A. M. on said date, to the hour of 8:30 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A THIRD CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the

safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 5, 1915, at its office and station at Shelley, in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: A. R. Weston, to be and remain on duty for a period longer than nine hours in said twenty-four-hour period, to-wit: From said hour of 7:00 o'clock A. M. on said date, to the hour of 6:30 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FOURTH CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twentyfour-hour period beginning at the hour of 7:00 o'clock A. M. on April 6, 1915, at its office and station at Shelley, in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: A. R. Weston, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: From said hour of 7:00 o'clock A. M. on said date, to the hour of 6:30 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FIFTH CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier en-

gaged in interstate commerce by railroad in the State of Idaho.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twentyfour-hour period beginning at the hour of 6:30 o'clock A. M. on April 20, 1915, at its office and station at Dayton, in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: T. E. Vissing, to be and remain on duty for a longer period than nine hours in said twenty-four-hour pe-From said hour of 6:30 o'clock A. M. riod, to-wit: on said date, to the hour of 12 o'clock, noon, on said date, and from the hour of 1:00 o'clock P. M. on said date, to the hour of 7:40 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of twenty-five hundred dollars and its costs herein expended.

JAMES S. McCLEAR, United States Attorney.

Endorsed: Filed Sept. 8, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

In the District Court of the United States for the District of Idaho, Eastern Division.

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

ANSWER.

Comes now the defendant, Oregon Short Line Railroad Company, and for answer to the complaint filed herein, admits, denies and alleges as follows:

ANSWERING THE FIRST ALLEGED CAUSE OF ACTION:

The defendant admits that it now is and was at all of the times therein mentioned a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Further answering said first alleged cause of action, defendant denies that during the twenty-four-hour period beginning at the hour of 7:00 o'clock

A. M. on April 2, 1915, at its office at Shelley, Idaho, it required and permitted or required or permitted its telegraph operator and employee, A. R. Weston, to be or remain on duty for a longer period than nine hours in said twenty-four-hour period, but admits that said A. R. Weston was at said time and place employed by this defendant as station agent and telegraph operator at Shelley, Idaho, within the jurisdiction of this court, and that on said 2nd day of April, 1915, said A. R. Weston did work as an operator and remain on duty as an operator from 7:00 o'clock A. M. on said date until 12:00, noon, thereof, and from 1:00 P. M. on said date to 5:00 P. M. thereof, and thereafter on said date, without the knowledge, permission or consent of this defendant, did continuously remain on duty, performing clerical work, but not as an operator, until 8:00 P. M. on said date.

Defendant admits that during all of the times mentioned in said complaint said office and station was one continuously operated day and night, but denies that said employee, while required or permitted to be and remain on duty, did at any time on said date after 5:00 P. M. thereof telegraph or telephone, dispatch, report, transmit, receive or deliver orders pertaining to or affecting the movement of trains engaged in interstate commerce.

Denies that the defendant is indebted to the plaintiff in the sum of \$500.00 or any other amount.

Further answering said first alleged cause of action, and as additional defense thereto, defendant al-

leges that prior to the said 2nd day of April, 1915, this defendant had issued and delivered instructions to all agents and operators, including the said A. R. Weston, prohibiting them and each of them from working in any capacity or performing any service of whatsoever nature, in excess of nine hours in any 24-hour period in any tower, office, station or place continuously operated night and day, but that notwithstanding said instructions and prohibition the said A. R. Weston remained continuously on duty as operator for a period of nine hours, and thereafter performed clerical services for an additional period of three hours, but that said clerical services were performed without the knowledge, permission or consent of this defendant, or any of its officers or agents except said servant, A. R. Weston, who was at said time acting contrary to the express instructions hereinbefore mentioned.

ANSWERING THE SECOND ALLEGED CAUSE OF ACTION:

The defendant admits that it now is and was at all of the times therein mentioned a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Further answering said second alleged cause of action, defendant denies that during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 3, 1915, at its office at Shelley, Idaho, it required and permitted or required or permitted its telegraph operator and employe, A. R. Weston, to be or remain on duty for a longer period

than nine hours in said 24-hour period, but admits that said A. R. Weston was at said time and place employed by this defendant as station agent and telegraph operator at Shelley, Idaho, within the jurisdiction of this court, and that on said 3rd day of April, 1915, said A. R. Weston did work as an operator and remain on duty as an operator from 7:00 o'clock A. M. on said date until 12:00, noon, thereof, and from 1:00 P. M. on said date to 5:00 P. M. thereof, and thereafter on said date, without the knowledge, permission or consent of this defendant, did continuously remain on duty, performing clerical work, but not as an operator, until 8:30 P. M. on said date.

Defendant admits that during all of the times mentioned in said complaint said office and station was one continuously operated day and night, but denies that said employe, while required or permitted to be or remain on duty, did at any time on said date after 5:00 P. M. thereof telegraph or telephone, dispatch, report, transmit, receive or deliver orders pertaining to or affecting the movement of trains engaged in interstate commerce.

Denies that the defendant is indebted to the plaintiff in the sum of \$500.00 or any other amount.

Further answering said second alleged cause of action, and as additional defense thereto, defendant alleges that prior to the said 3rd day of April, 1915, this defendant had issued and delivered instructions to all agents and operators, including the said A. R. Weston, prohibiting them and each of them from

working in any capacity or performing any service of whatsoever nature, in excess of nine hours in any 24-hour period in any tower, office, station or place continuously operated night and day, but that, not-withstanding said instructions and prohibition, the said A. R. Weston remained continuously on duty as operator for a period of nine hours, and thereafter performed clerical services for an additional period of three hours and a half, but that said clerical services were performed without the knowledge, permission or consent of this defendant, or of any of its officers or agents except said servant, A. R. Weston, who was at said time acting contrary to the express instructions hereinbefore mentioned.

ANSWERING THE THIRD ALLEGED CAUSE OF ACTION:

The defendant admits that it now is and was at all of the times therein mentioned a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Further answering said third alleged cause of action, defendant denies that during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 5, 1915, at its office at Shelley, Idaho, it required and permitted or required or permitted its telegraph operator and employe, A. R. Weston, to be or remain on duty for a longer period than nine hours in said 24-hour period, but admits that said A. R. Weston was at said time and place employed by this defendant as station agent and telegraph operator at Shelley, Idaho, within the jurisdiction of

this court, and that on said 5th day of April, 1915, said A. R. Weston did work as an operator and remain on duty as an operator from 7:00 o'clock A. M. on said date until 12:00, noon, thereof, and from 1:00 P. M. on said date to 5:00 P. M. thereof, and thereafter on said date, without the knowledge, permission or consent of this defendant, did continuously remain on duty, performing clerical work, but not as an operator, until 6:30 P. M. on said date.

Defendant admits that during all of the times mentioned in said complaint said office and station was one continuously operated day and night, but denies that said employe, while required or permitted to be or remain on duty, did at any time on said date after 5:00 P. M. thereof telegraph or telephone, dispatch, report, transmit, receive or deliver orders pertaining to or affecting the movement of trains engaged in interstate commerce.

Denies that the defendant is indebted to the plaintiff in the sum of \$500.00 or any other amount.

Further answering said third alleged cause of action, and as additional defense thereto, defendant alleges that prior to the 5th day of April, 1915, this defendant had issued and delivered instructions to all agents and operators, including the said A. R. Weston, prohibiting them, and each of them, from working in any capacity or performing any service of whatsoever nature, in excess of nine hours in any 24-hour period in any tower, office, station or place continuously operated night and day, but that, not-

withstanding said instructions and prohibition, the said A. R. Weston remained continuously on duty as operator for a period of nine hours, and thereafter performed clerical services for an additional period of one hour and a half, but that said clerical services were performed without the knowledge, permission or consent of this defendant, or of any of its officers or agents except the said servant, A. R. Weston, who was at said time acting contrary to the express instructions hereinbefore mentioned.

ANSWERING THE FOURTH ALLEGED CAUSE OF ACTION:

The defendant admits that it now is and was at all of the times therein mentioned a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Further answering said fourth alleged cause of action, defendant denies that during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 6th, 1915, at its office at Shelley, Idaho, it required and permitted or required or permitted its telegraph operator and employe, A. R. Weston, to be or remain on duty for a longer period than nine hours in said 24-hour period, but admits that said A. R. Weston was at said time and place employed by this defendant as station agent and telegraph operator at Shelley, Idaho, within the jurisdiction of this court, and that on said 6th day of April, 1915, said A. R. Weston did work as an operator and remain on duty as an operator from 7:00 o'clock A. M. on said date until 12:00,

noon, thereof, and from 1:00 P. M. on said date to 5:00 P. M. thereof, and thereafter on said date, without the knowledge, permission or consent of this defendant, did continuously remain on duty, performing clerical work, but not as an operator, until 6:30 P. M. on said date.

Defendant admits that during all of the times mentioned in said complaint said office and station was one continuously operated day and night, but denies that said employe, while required or permitted to be or remain on duty, did at any time on said date after 5:00 P. M. thereof telegraph or telephone, dispatch, report, transmit, receive or deliver orders pertaining to or affecting the movement of trains engaged in interstate commerce.

Denies that the defendant is indebted to the plaintiff in the sum of \$500.00 or any other amount.

Further answering said fourth alleged cause of action, and as additional defense thereto, defendant alleges that prior to the 6th day of April, 1915, this defendant had issued and delivered instructions to all agents and operators, including the said A. R. Weston, prohibiting them, and each of them, from working in any capacity or performing any service of whatsoever nature, in excess of nine hours in any 24-hour period in any tower, office, station or place continuously operated night and day, but that, notwithstanding said instructions and prohibition, the said A. R. Weston remained continuously on duty as operator for a period of nine hours, and thereafter performed clerical services for an additional period

of one hour and a half, but that said clerical services were performed without the knowledge, permission or consent of this defendant, or any of its officers or agents except the said servant, A. R. Weston, who was at said time acting contrary to the express instructions hereinbefore mentioned.

FOR ANSWER TO THE FIFTH ALLEGED CAUSE OF ACTION:

Defendant admits that it now is and was at all of the times therein mentioned a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Defendant admits that during the 24-hour period beginning at the hour of 6:30 A. M. on April 20, 1915, at its office and station at Dayton, in the State of Idaho, and within the jurisdiction of this court, it did permit a certain telegraph operator, to-wit: T. E. Vissing, to be and remain on duty for a longer period than nine hours in said 24-hour period as set forth in said fifth cause of action, but denies that at the time therein mentioned said office and station was one continuously operated night and day, but defendant alleges the fact to be that on the afternoon of the 19th day of April, 1915, it issued an order which provided that, effective April 19, 1915, the night office at Oxford (distant 10 miles from said station of Dayton) should be closed and a night office opened at Dayton, and that the hours at Dayton should be from 9:00 A. M. to 7:00 P. M. and 10:00 P. M. to 8:00 A. M., and directed an additional operator to report at Dayton on the morning of April 20, 1915.

That said additional operator did not report until 7:40 on the afternoon of said day, and that on the morning of said 20th day oof April, 1915, the order hereinbefore referred to was suspended to the extent that said T. E. Vissing was directed to and did proceed to work for the number of hours that he had been accustomed to work at said station as a station not continuously operated night and day, except that he went on duty on the morning of said 20th day of April, 1915, at 6:30 A. M. instead of 9:00 A. M. as theretofore, but that said station had not been open or operated on the night preceding or one continuously operated prior to the said T. E. Vissing going on duty at 6:30 A. M. on said date, and that said station did not in fact fall within the class of one continuously operated night and day until after the services performed by the said T. E. Vissing set forth in said complaint.

Denies that the defendant is indebted to the plaintiff in the sum of \$500.00 or any other amount.

Wherefore, the defendant, having fully answered herein, prays that it may be hence dismissed with its just costs and disbursements herein incurred.

GEORGE H. SMITH, H. B. THOMPSON,

Attorneys for Defendant.

Residence and postoffice address: H. B. Thompson, Pocatello, Idaho.

State of Idaho, County of Bannock.—ss.

H. B. Thompson, being first duly sworn, deposes

and says: That he is attorney and statutory agent for the Oregon Short Line Railroad Company, the defendant herein; that he has read the above and foregoing answer and is acquainted with the contents thereof, and he verily believes the matters therein stated to be true.

H. B. THOMPSON.

Subscribed and sworn to before me this 27th day of September, 1915.

CARL BARNARD,

(Seal)

Notary Public,
Pocatello, Idaho.

Service acknowledged and a copy thereof received this 28th day of September, 1915.

J. L. McCLEAR,

J. R. SMEAD,

Attorneys for Plaintiff.

Endorsed: Filed Sept. 28, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

In the District Court of the United States in and for the District of Idaho, Eastern Division.

No. 172.

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

MOTION FOR JUDGMENT.

Comes now the United States of America, plaintiff in the above entitled action, and moves this Court that judgment be entered in its favor and against defendant on the pleadings herein for the following reasons, to-wit:

I.

If the truth of the allegations in defendant's answer on file herein contained be admitted, such facts are nevertheless insufficient to constitute at law any defense to the allegations of plaintiff's complaint on file herein. This motion is directed to each count of plaintiff's complaint herein and the corresponding count of defendant's answer, in which is purported to be stated a defense to the corresponding count in plaintiff's complaint.

J. R. SMEAD,

Assistant United States Attorney for the District of Idaho,

Attorney for Plaintiff.

Endorsed: Filed Oct. 20, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

In the United States District Court for the District of Idaho, Eastern Division.

UNITED STATES,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD CO.,

Defendant.

DECISION.

October 23, 1915.

John R. Smead, Assistant U. S. District Attorney, for Plaintiff.

George H. Smith and H. B. Thompson, for Defendant.

Dietrich, District Judge:

This is an action to recover from the defendant penalties for five different alleged violations of what is commonly known as the "Hours of Service Act" (34 Stat. 1415). Upon the coming in of the defendant's answer to the complaint, the plaintiff moved for judgment on the pleadings, and by agreement between counsel the cause has been finally submitted upon the questions of law thus raised. There are five counts in the complaint, the first four of which are in legal aspect identical; a distinct question is presented by the answer to the fifth.

As to each of the first four counts the defendant admits that its employe, A. R. Weston, a telegraph operator in its station at Shelley, Idaho, remained on duty nine hours in the twenty-four as operator, and thereafter three additional hours performing clerical work. It also concedes that the fact that the overtime was given to clerical work is not controlling, but it further alleges that this extra service was in violation of the defendant's general rules, and was without the knowledge of any of its officers or agents other than Weston himself; and this want of actual knowledge is the defense and the only defense relied upon.

A carrier is liable if, in the language of the act, it "requires or permits" an employe to remain on duty more than nine hours; and under section 3 it is "deemed to have had knowledge of all acts of its

officers and agents." The precise point urged by the defendant is that, not having actual knowledge that Weston was working over-time, it cannot be held to have "permitted" the unlawful act, for the term permit necessarily implies both knowledge and consent. Gregory v. United States, 10 Fed. Cases 1195, 1197; In re Wilmington, 120 Fed. 180, 184; Wilson v. State, 46 N. E. 1050, 1051; People v. Conness, 88 Pac. 821, 824; Words and Phrases, Vol. 6, p. 5317. The difficulty with the argument is that if it is given place, section 3 of the act is rendered wholly ineffective, for if the knowledge thus imputed cannot, when considered in connection with inaction on the part of the carrier, be made the basis for an inference or permission or consent, it can serve no useful purpose at all. If not only knowledge but permission in fact must be proved, and if, as contended, permission in fact cannot be predicated upon the imputed knowledge, it necessarily follows that actual knowledge must always be affirmatively established as any other material fact. In the argument the knowledge referred to in section 3 was assumed to be constructive only, but it is to be noted that it is not so designated in the act. The declaration is that the carrier shall be "deemed to have had knowledge"-not constructive knowledge. A corporation can, of course, acquire knowledge only through its officers and agents. Under the rules of general law it is chargeable with the knowledge not of all of its officers and agents, but of only certain classes thereof. But within the scope of the rule, actual notice to the officer or agent is deemed to be actual notice to the corporation.

is thought that the statute here simply operates to enlarge or extend the application of the general rule beyond those certain classes to which it is now confined, to all officers and agents, and therefore the knowledge which comes to the corporation through an inferior agent is of the same quality as that which comes through one having general authority; in both cases the notice is deemed to be actual and not merely constructive. I am unable to yield to the suggestion that the only effect of section 3 is to cast upon the carrier the burden of showing that it was without knowledge. The language is inapt to express such a purpose. The declaration is absolute and unqualified: "In all prosecutions * * * the common carrier shall be deemed to have had knowledge, etc." The statute identifies the carrier with all of its agents, inferior as well as superior, and to it is imputed the knowledge of any one of them. It once appearing that some officer or agent had knowledge, it becomes quite immaterial to show that other officers or agents were without such knowledge. It is doubtless true that so interpreted the act is rigorous and may now and then operate harshly upon the carrier, but, upon the other hand, it is apparent that under the view urged by the defendant it would be a much less efficient means of accomplishing the manifest purpose for which it was designed. From the discussion it follows that the answer states no defense to the first four causes of action, and as to them the motion for judgment must be allowed. It should be added that while the reasoning may in some respects

be different, the conclusion is fully supported by O.-W. R. & N. Ry. Co. v. United States, 213 Fed. 688, and is, to say the least, not out of harmony with the views expressed by the Circuit Court of Appeals in its opinion of affirmance in that case (223 Fed. 596).

The controlling question touching the fifth cause of action is whether or not the defendant's telegraph office or station at Dayton, Idaho, was, during the whole of the 20th day of April, 1915, "continuously operated," as contemplated by the provisions of the act. The operator, Vissing, was on duty more than nine, but less than thirteen hours, and if it was not a "continuously operated" office, no wrong was done. It appears that prior to April 20th Vissing had been the sole operator, and the office was kept open only part of the time, but on April 19th the defendant issued on order that, commencing with the 20th, the office should be continuously operated, and arranged for an additional operator. But upon the morning of the 19th the new operator having failed to appear, the order of the preceding day was suspended until the evening of the 20th, when the services of an additional operator were secured. Vissing was on duty for the number of hours he had been accustomed to work, and as a matter of fact the office was kept open continuously on the 20th. But I am inclined to think that what was done was obnoxious to neither the letter nor the spirit of the act. Suppose that, the other facts being the same, the company had not decided to change to a "continuously operated" office until the hour of seven-forty P. M. on

April 20th, the time when the additional operator appeared. We would have a case where the office was in fact operated continuously on April 20th, but in law it did not become such until seven-forty P. M., and surely the decision at that hour to change the character of office could not be given the retroactive effect of making unlawful the service of Vissing, which at the time it was rendered was entirely within the terms of the statute. In principle and legal aspect the supposed case is indistinguishable from the case made by the answer. Accordingly as to the fifth count the motion will be denied and the complaint dismissed.

Endorsed: Filed Oct. 23, 1915. W. D. McReynolds, Clerk.

In the District Court of the United States in and for the District of Idaho, Eastern Division.

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

DECREE.

This cause, having heretofore come on for hearing, and the same having been submitted to the consideration of this Court by agreement of attorneys for the respective parties signified in open court, upon plaintiffs' motion for judgment upon the plead-

ings; and the Court having heard the arguments touching said motion by respective counsel, and being fully advised in the premises;

Now, therefore, it is hereby ordered, adjudged and decreed that the plaintiff have and recover from the defendant the sum of fifty (\$50.00) dollars on each of the first four counts of plaintiff's complaint, a total sum of two hundred (\$200.00) dollars, together with plaintiff's costs in this behalf laid out and expended, hereby taxed at the sum of \$16.00, to which defendant's exception is noted and allowed.

And it is hereby further ordered, adjudged and decreed that the plaintiff take nothing by reason of the fifth count in said complaint and that as to said fifth count plaintiff's complaint be, and the same hereby is, dismissed.

FRANK S. DIETRICH,

Judge.

Dated October 28th, 1915.

Endorsed: Filed Oct. 28, 1915. W. D. McReynolds, Clerk. Pearl E. Zanger, Deputy.

In the District Court of the United States in and for the District of Idaho, Eastern Division.

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant.

BILL OF EXCEPTIONS.

This cause came on duly and regularly for hearing before Honorable F. S. Dietrich, Judge of the above court, on the 20th day of October, 1915, J. R. Smead, Esq., appearing for the plaintiff, and H. B. Thompson, Esq., appearing for the defendant. Whereupon the plaintiff filed in open court motion for judgment on the pleadings and a demurrer to the defendant's answer, but withdrew said demurrer, and thereupon, pursuant to agreement between counsel for the respective parties orally made in open court, said motion for judgment on the pleadings was argued by counsel and submitted and by the court taken under advisement; and thereafter the court being fully advised did on the 23rd day of October, 1915, make a written decision, which is filed herein. allowing said motion for judgment on the pleadings with reference to the first four causes of action, and denied said motion as to the fifth or last cause of action; and thereafter on the 28th day of October. 1915, a judgment of the court was duly signed and filed decreeing that the plaintiff have and recover from the defendant the sum of \$50.00 on each of said four counts, or causes of action, making a total sum of two hundred (\$200.00) dollars, together with plaintiff's costs taxed in the sum of \$16.00, and on motion of defendant's counsel, which was consented to by counsel for plaintiff, it was expressly stated that defendant have and be allowed an exception to the judgment of the court as aforesaid, and exception is hereby allowed defendant's counsel to the ruling and decision of the court and its said judgment.

Thereupon defendant tenders this its bill of exceptions to the action of the court in the particulars hereinbefore set forth, which is signed in open court, sealed and made a part of the record in this case this 6th day of November, 1915.

FRANK S. DIETRICH,

Judge of said Court.

Consent to the allowance and filing of the foregoing bill of exceptions is hereby given, and service thereof hereby acknowledged.

J. L. McCLEAR,
U. S. Attorney, District of Idaho;
J. R. SMEAD,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Endorsed: Filed Nov. 6, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

In the District Court of the United States in and for the District of Idaho, Eastern Division.

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

PETITION FOR WRIT OF ERROR.

To the Honorable F. S. Dietrich, Judge of the District Court aforesaid:

Now comes the Oregon Short Line Railroad Com-

pany, defendant herein, by its attorneys, and respectfully shows that on the 28th day of October, 1915, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Your petitioner, feeling itself aggrieved by said judgment entered as aforesaid, herewith petitions the court for an order allowing it to prosecute a writ of error in the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such case made and provided.

Wherefore, Your petitioner prays that a writ of error may be issued in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that the transcript of record, pleadings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals; and that an order be made fixing the amount of security which defendant shall furnish upon said writ of error for costs and damages, and to operate as a supersedeas bond.

GEORGE H. SMITH, H. B. THOMPSON, Attorneys for Defendant.

Residence and postoffice address: H. B. Thompson, Pocatello, Idaho.

Service of the foregoing petition admitted this 13th day of December, 1915.

J. L. McCLEAR,
J. R. SMEAD,

Attorneys for Plaintiff.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

In the District Court of the United States in and for the District of Idaho, Eastern Division.

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

ASSIGNMENTS OF ERROR.

The Oregon Short Line Railroad Company, defendant in this action, in connection with and as a part of its petition for a writ of error filed herein makes the following assignments of error which it avers were committed by the court in the rendition of the judgment against this defendant appearing from the records herein, that is to say:

- 1. The Court erred in holding and deciding that the plaintiff was entitled to judgment on the pleadings on each of the first four counts of the complaint.
 - 2. The Court erred in rendering judgment on the

pleadings against the defendant on the first four counts of the complaint, and each thereof.

OREGON SHORT LINE RAILROAD COM-PANY, Defendant.

By GEORGE H. SMITH,
H. B. THOMPSON,

Its Attorneys.

Residence and postoffice address: H. B. Thompson, Pocatello, Idaho.

Service of the foregoing assignments of error is hereby admitted this 13th day of December, 1915.

J. L. McCLEAR,J. R. SMEAD,Attorneys for Plaintiff.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

In the District Court of the United States in and for the District tof Idaho, Eastern Division.

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 13th day of December, 1915, came defendant, by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error, and filed herein and presented an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the said writ of error upon the defendant's giving bond according to law in the sum of one thousand (\$1000.-00) dollars, which shall operate as a supersedeas bond.

FRANK S. DIETRICH, Judge.

Service of the foregoing order allowing writ of error admitted this 13th day of December, 1915.

J. L. McCLEAR,J. R. SMEAD,Attorneys for Plaintiff.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

In the District Court of the United States in and for the District of Idaho, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

SUPERSEDEAS BOND.

Know All Men by These Presents: That the Oregon Short Line Railroad Company, as principal, and D. W. Church and Lyman Fargo, as sureties, are held and firmly bound unto the United States of America in the full and just sum of one thousand (\$1000.00) dollars, to be paid to the said United States of America, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 11th day of December, 1915.

Whereas, Lately at the October term of the District Court of the United States within and for the District of Idaho, Eastern Division, in a suit pending in said court between the United States of America, plaintiff, and Oregon Short Line Railroad Company, defendant, judgment was rendered against said defendant, and said defendant has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, sixty (60) days from and after the date of said citation.

Now the condition of the above obligation is such that if the said Oregon Short Line Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs, if it shall fail to make good its plea, then the above obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered this 11th day of December, 1915.

OREGON SHORT LINE RAILROAD COM-PANY.

By H. B. THOMPSON,

Its Attorney.

D. W. CHURCH,

LYMAN FARGO,

Sureties.

State of Idaho, County of Bannock,—ss.

D. W. Church and Lyman Fargo, each being severally duly sworn, deposes and says: That he is the surety whose name is subscribed to the within and foregoing undertaking; that he is a resident and free-holder within the County of Bannock, State of Idaho, and that he is worth the sum specified in the within and foregoing undertaking as the penalty thereof, over and above all his just debts and liabilities, and exclusive of property exempt by law from execution.

D. W. CHURCH. LYMAN FARGO.

Subscribed and sworn to before me this 11th day of December, 1915.

(Seal)

LORENZO D. BROWN,

Notary Public,

Pocatello, Idaho.

My commission expires June 10th, 1916.

We hereby accept the foregoing bond and the sureties thereon as a sufficient bond on the writ of error allowed herein.

> J. L. McCLEAR, J. R. SMEAD.

> > Attorneys for Plaintiff.

Approved this 13th day of December, 1915. FRANK S. DIETRICH,

Judge.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

In the District Court of the United States in and for the District of Idaho, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

WRIT OF ERROR.

The President of the United States of America to the Honorable Judge of the District Court of the United States for the District of Idaho, Eastern Division—Greeting:

Because in the records and proceedings, as also in the rendition of the judgment in a cause pending in the said District Court before you, at the October term, 1915, thereof, between the Oregon Short Line Railroad Company, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Oregon Short Line Railroad Company, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial District, together with this writ, so that you have the same at the City of San Francisco in the State of California within thirty (30) days from the date hereof, in the said Circuit Court of Appeals, to be then and there held that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may further cause to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witnesseth, The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of December, in the year of our Lord 1915.

Issued at Boise, Idaho, with the seal of the United States District Court of the District of Idaho, and dated as aforesaid.

(Seal) W. D. McREYNOLDS,

Clerk of said United States District Court.

Allowed by Frank S. Dietrich, District Judge.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

In the District Court of the United States in and for the District of Idaho, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

CITATION.

The President of the United States to the United States of America, and to J. L. McClear and J. R. Smead, United States Attorneys for the District of Idaho—Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Judicial District, to be held at the City of San Francisco in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the District of Idaho, Eastern Division, wherein the Oregon Short Line Railroad Company is plaintiff in error, and you the said United States of America is defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, The Honorable William B. Gilbert, United States Circuit Judge, this 13th day of December, 1915. FRANK S. DIETRICH,

United States District Judge.

Service of the within citation admitted this 13th day of December, 1915.

J. L. McCLEAR, J. R. SMEAD,

Attorneys for Defendant in Error.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

In the District Court of the United States in and for the District of Idaho, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

RETURN TO WRIT OF ERROR.

In obedience to the command of the within writ, I herewith transmit to the Ninth Circuit Court of Appeals of the United States, a duly certified transcript of the record and proceedings in the within entitled cause, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the United States District Court for the District of Idaho.

(Seal) W. D. McREYNOLDS,

Clerk of the United States District Court for the District of Idaho.

CLERK'S CERTIFICATE OF TRANSCRIPT OF RECORD.

I, W. D. McReynolds, Clerk of the District Court of the United States in and for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 43, inclusive, contain true and correct copies of the Complaint, Answer, Motion for Judgment on the Pleadings, Opinion of the Court, Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Bond on Writ of Error, Writ of Error, Citation on Writ of Error, Return to Writ of Error, and Certificate of Clerk, in the above entitled cause, which constitute the transcript of the record and return to the annexed Writ of Error.

I further certify that the costs of the record herein amount to the sum of \$63.85 and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said District Court affixed at Boise, Idaho, this 24th day of December, 1915.

W. D. McREYNOLDS, Clerk.



IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

OREGON SHORT LINE RAILROAD COMPANY, a Corporation,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error in the United States District Court for the District of Idaho, Eastern Pivision.

FEB 3 - 1916

GEORGE H. SMITH, H. B. THOMPSON,

F. D. Monckton,

Attorneys for Plaintiff in Error. Clerk

J. L. McCLEAR,

J. R. SMEAD,

Attorneys for Defendant in Error.



IN THE

United States

Circuit Court of Appeals

For the Minth Circuit

OREGON SHORT LINE RAILROAD COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error in the United States District Court for the District of Idaho, Eastern Division.

GEORGE H. SMITH,

H. B. THOMPSON,

Attorneys for Plaintiff in Error.

J. L. McCLEAR,

J. R. SMEAD,

Attorneys for Defendant in Error.



In the United States Circuit Court of Appeals for the Ninth Circuit.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation,

Plaintiff in Error.

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error From the United States
District Court.

STATEMENT OF THE CASE.

This action was instituted by the United States of America against the Oregon Short Line Railroad Company to recover on four counts or causes of action for the alleged violation by a station agent of the defendant company of the act of Congress known as "An Act to promote the safety of Employees and Travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (34 Stat. L., 1415), alleged to have occurred on four different occasions, to-wit: April 2, 3, 5 and 6, 1915, at Shelley, Idaho, at which times and place it was alleged that,

"Defendant during the 24 hour period beginning at the hour of 7:00 o'clock a.m. (on each day in question) at its office and station at Shelley in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employe, to-wit: A. R. Weston, to be and remain on duty for a longer period than nine

hours in said 24 hour period, to-wit: from 7:00 o'clock a. m. on said date to the hour of 8:00 o'clock p. m. on said date,''

the time of alleged termination of duty on each day varying somewhat from the other, but each being in excess of nine hours.

It was further alleged that the station was one continuously operated night and day, and that said employe while required and permitted to be and remain on duty did, by the use of telegraph and telephone dispatch, report, transmit, receive and deliver orders pertaining to and affecting the movement of trains engaged in Interstate Commerce, and demanding a penalty for each alleged violation. (Tr. pp. 8-11).

The defendant for answer to the first cause of action denied that during the 24 hour period beginning at 7:00 o'clock a. m. on April 2, 1915, at its office at Shelley, Idaho, it required and permitted or required or permitted said telegraph operator and employee to be or remain on duty for a longer period than nine hours in said 24 hour period, but admitted that he was at said time and place employed by defendant as station agent and telegraph operator, and that on said date he worked as an operator and remained on duty as an operator from 7:00 o'clock a. m. until 12:00 noon, and from 1:00 p. m. on said date to 5:00 p. m. thereof, and that thereafter on said date without the knowledge, permission or consent of the defendant did continuously remain on duty performing clerical work, but not as an operator, until 8:00 p. m. and admitted that at all of said times said station was one continuously operated day and

night (Tr. p. 14); and for further answer alleged that prior to the 2nd day of April, 1915, the defendant had issued and delivered instructions to all agents and operators, including the particular one in question, prohibiting them, and each of them, from working in any capacity or performing any service in excess of nine hours in each 24 hour period in any place continuously operated night and day, but that notwithstanding said instruction and prohibition said A. R. Weston remained continuously on duty as operator for nine hours and thereafter performing clerical services for the additional period alleged in the complaint, but that at all of said times it was without the knowledge, permission or consent of the defendant, or any of its officers or agents, except said servant A. R. Weston, who was at said time acting contrary to the express instruction hereinbefore referred to (Tr. p. 15). The answer was the same in all substantial particulars with reference to each of the other three causes of action, which are here for review.

To the answer filed by the defendant plaintiff moved for judgment on the pleadings as to each of the four counts upon the following grounds:

"If the truth of the allegations in defendant's answer on file herein contained be admitted such facts are nevertheless insufficient to constitute at law any defense to the allegations of plaintiff's complaint on file herein." (Tr. p. 24).

The motion was argued and submitted to Hon. F. S. Dietrich, Judge of the Court, and by him taken under advisement and decision thereafter rendered sustaining the plaintiff's motion for judgment on the pleadings (Tr. pp. 25-29), and judgment was entered accordingly

in which the total penalty was fixed at Two Hundred (\$200.00) Dollars (Tr. p. 30), from which judgment the defendant comes to this court on Writ of Error.

The question raised by the motion for judgment on the pleadings, it will be observed, was whether in a case where the hours of service were violated by an employe, but without his being required or permitted by any officer or agent or other person in the company's employ, and without knowledge to the corporation or any such person, but of his own accord and in violation of the terms of his employment, and his express inhibition, the carrier was guilty of a breach of the statute and subject to a penalty.

SPECIFICATIONS OF ERROR.

- 1. The Court erred in holding and deciding that the plaintiff was entitled to judgment on each of the first four counts of the complaint.
- 2. The Court erred in rendering judgment on the pleadings against the defendant in the first four counts of the complaint, and each thereof (Tr. pp. 34-35).

POINTS AND AUTHORITIES.

1. It was not the intention of Congress in the enactment of the hours of service law that the carrier should be absolutely liable for every violation of hours of service by an employe without reference to whether such employe was required or permitted so to do by any superior officer or agent of the company.

Sections 1 and 3, Act of March 4, 1907; (34 Stat. L., 1415-1416).

2. In cases admitting of doubt the intent of the law maker is to be sought in the entire context of the section, statute or series of statutes in pari materia, and general language found in one part of a statute may be restricted in effect to particular expressions employed in another, if such intent appears.

Atkins vs. Fiber Disintegrating Co., 18 Wall., 272, 21 L. Ed., 841, 844;

Brown vs. United States, 113 U. S., 571, 28 L. Ed., 1080;

Smythe vs. Fike, 23 Wall, 380, 23 L. Ed., 47.

3. A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter.

People vs. Ins. Co., 15 Johns., 380;

Atkins vs. Fiber Disintegrating Co., 18 Wallace, 272.

4. This being a penal statute should be strictly construed.

U. S. vs. Harris, 177 U. S., 305, 309, 44 L. Ed., 780, 781.

Bolles vs. Outing Co., 175 U. S., 265, 268, 44 L. Ed., 157, 180.

5. Penalties should not be extended by construction.

A. T. & S. F. R. Co. vs. People, 227 Ill., 278, 81 N. E., 342;

State vs. C. C. & St. L. R. Co., 157 Ind., 288, 61 N. E., 669.

6. To "require" or "permit" the performance of any act there must be shown to be (1) knowledge and (2)

"consent" on the part of the person charged with having required or permitted the act.

Gregory vs. U. S., 10 Fed. Cases, 1195, 1197; Wilson vs. State, 46 N. E., 1050, 1051; Mitchell Lime Co. vs. Nickless, 85 N. E., 728, 729.

7. A statute which deprives a party of his opportunity of presenting his side of the case, or defense, is unconstitutional.

Luria vs. U. S., 231 U. S., 9, 58 L. Ed., 101; State vs. Beach, 36 L. R. A., 179.

8. A statute making a rule of evidence conclusive is unconstitutional, in that it deprives one against whom the rule works of due process of law, contrary to the fifth amendment to the Constitution of the United States.

Bailey vs. State of Alabama, 219 U. S., 219;M. J. & K. Co. vs. Turnipseed, 219 U. S., 35.

9. In establishing a rule of evidence there must be a rational and logical connection between the facts proved and facts presumed.

The common law did not impute to the corporation the knowledge of all its officers and agents, but only when the knowledge was gained while acting for the corporation within the scope of their authority or with reference to the particular transaction.

> 2 Thompson Corp. Secs., 1646, 1649; The Distilled Spirits, 11 Wall. (U. S.), 336, 356;

Rogers vs. Palmer, 102 U. S., 263, 268.

ARGUMENT.

T.

THE CARRIER IS NOT LIABLE FOR THE VIOLATION OF HOURS OF SERVICE BY AN EMPLOYE WHERE SUCH VIOLATION OCCURRED WITHOUT THE KNOWLEDGE OR CONSENT OF ANY SUPERIOR OFFICER OR AGENT REQUIRING OR PERMITTING THE OVER-SERVICE.

The statute, in our opinion, makes a clear distinction between officers and agents who may require or permit an employe to work in excess of the periods therein prescribed, and such employe. In Section 1 it is provided "that the provisions of this act shall apply to any common carrier or carriers, their officers, agents and employees;" AND thereafter in Section 1 it is provided,

"The term 'employe' as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train."

Section 3 provides:

"That any such common carrier or any officer or agent thereof requiring or permitting any employe to go, be or remain on duty in violation of the second section hereof shall be liable to a penalty."

At the outset, then, officers and agents who may require or permit such employees to remain on duty in violation of the statute are put upon a different footing than the employes themselves. The carrier, a corporation, cannot require or permit the employes defined by the statute to be or remain on duty except by the direction or consent of one of those designated superiors, to-wit: an officer or agent, for an employe or other

person cannot be "required" or "permitted" to be or remain on duty except by authority of a superior, as is necessarily implied by the very terms employed, and, on general principle, in order for an employe to be required or permitted to do a thing, permission must flow from some superior source and cannot come from an interior or one of equal rank, and, therefore, authority to violate the statute cannot reside in the employe himself.

We are forced to this conclusion for the further reason that Congress has provided by Section 3 of the Act that in all prosecutions thereunder "the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents" thereinbefore referred to without extending this presumption against the carrier to embrace "employes," thereby again placing the officers and agents in juxtaposition to the employes theretofore defined.

It must be presumed, therefore, that the words "officers" and "agents," designated in Section 3 of the Act as those persons of whose acts the carrier is deemed to have knowledge were used, and so intended, in the sense in which they were previously used in the same section and other portions of the statute, as representing administrative or superior officers and agents, with the power and authority to require or permit the "employes" to go, be or remain on duty.

[&]quot;In cases admitting of doubt the intent of the law maker is to be sought in the entire context of the section, statute or series of statutes in pari materia" and

"General language found in one part of a statute may be restricted in effect to particular expressions employed in another, if such intent appears."

Atkins vs. Fiber Disintegrating Co., 18 Wallace, 272, 21 L. Ed., 841, 844;

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A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter.

People vs. Ins. Co., 15 Johns, 380;

Atkins vs. Fiber Disintegrating Co., 18 Wall., 301;

Smythe vs. Fike, 23 Wall., 380, 23 L. Ed., 47, 49.

This being a penal statute should be strictly construed.

U. S. vs. Harris, 177 U. S., 305, 309, 44 L. Ed., 780, 781;

Bolles vs. Outing Co., 175 U. S., 265, 268, 44 L. Ed., 157, 180.

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Penalties are not to be extended by construction:

A. T. & S. F. R. Co. vs. People, 227 Ill., 278, 81 N. E., 342;

State vs. C. C. C. & St. L. R. Co., 157 Ind., 288, 61 N. E., 669.

See also,

U. S. vs. A. T. & S. F., 220 U. S., 55 L. Ed., 361, 363.

Construing the statute, therefore, according to the foregoing guides of construction, there is no escape from the conclusion that before either the common carrier or any of its officers or agents can be penalized it must be found that one of such officers or agents charged with the duty of supervising and regulating the hours of service of "employes" required or permitted the employe to work in excess of the statutory period and where such employe exceeds the hours of lawful service without being so required or permitted by such an officer or agent so to do, neither the carrier nor such officer or agent can be penalized.

II.

In prosecutions under the statute the carrier is charged with knowledge only of the acts of such of its officers or agents as have required or permitted an employe to go, be or remain on duty in violation of the second section thereof.

This conclusion, we believe, follows as a natural corollary of the conclusion arrived at in Point I, for if an officer or agent had not required or permitted an employe to be or remain on duty in violation of law, there would be no pertinent knowledge of any officer or agent with which to charge the carrier or officer or agent. For instance, it would not be contended that the Auditor or Treasurer of the company, situated at its general offices, would be subject to a penalty for requiring or permitting an employe, such as the one in this case, to

be or remain on duty for more than nine hours at a continuously operated station, for the words "REQUIRE OR PERMIT" IMPLY AUTHORITY AND KNOWLEDGE OF THE FACT, for while the statute charges the master with knowledge of the acts of its officers and agents, the carrier is not liable unless, being so charged with knowledge, it either causes or consents to the servants working in excess of the hours prescribed; or, to use the words of the statute, unless it shall "require or permit" an employe subject to the act to remain on duty in excess of the prescribed hours. In this conclusion we believe we are fully supported both by lexicographers and the courts in the construction of such terms similarly applied:

In Gregory vs. U. S., 10, Fed. Cases, 1195, 1197, the Court says:

"Webster defines the word (permit) as involving the most positive assent. The word 'permit' is defined thus: 'to grant permission, liberty or leave; to allow, to suffer, to tolerate, to empower, to license, to authorize.' So that to authorize the forfeiture of land used as entrance to an illicit distillery the owner must have knowledge of such use."

In re. Wilmington, 120 Fed., 180, 184, the Court said:

"One does not *permit* the removal of property who has neither the power nor right to prevent it."

In Wilson vs. State, 46 N. E., 1050, 1051, the Court said:

"The word permit is more positive than the word allow or suffer, denoting a decided assent, the definition of the word including knowledge of what has to be done under the permission and intention that what is done is what is to be done; and hence entry of a saloon by a bartender at a time when the sale of liquor is prohibited, without the proprietor's knowledge and against his orders does not render the proprietor liable for a violation of the statute."

See also U. S. vs. San Francisco Bridge Co., 88 Fed., 891, 893.

"Permission implies both (1) knowledge and (2) consent."

Stuart vs. State, 60 S. W., 554; Words and Phrases, Vol. 6, p. 5317.

"The word 'permit' necessarily implies power to prevent."

Mitchell Lime Co. vs. Nickless, 85 N. E., 728, 729.

Permit means to consent after one has knowledge.

People vs. Conness, 88 Pac. (Cal.), 821, 824.

In State vs. Baker, 71 Mo., 475, a woman, in the absence of her husband and against his instructions, sold liquor unlawfully, and in holding that the husband was not criminally liable, the Court said: "The maxim Qui facit per alium facit per se, cited on behalf of the State, is only applicable in criminal cases where the instructions of the principal are obeyed, not where they are, as the evidence offered tended to show, palpably violated."

"To convict the master of the act of the servant, the government must show that the master participated in the act, or countenanced it or otherwise approved it. "It is not enough that it (the act) was done in the course of the servant's employment in the master's business."

Commonwealth of Mass. vs. Riley, 81 N. E., 881, 10 L. R. A. (N. S.), 1122.

"While a broader rule prevails in respect of a master's civil responsibility for the acts of his servant or agent, ordinarily he is not held responsible criminally unless he in some way participated in, countenances or approves the criminal act of his servant. Ordinarily if a servant does a criminal act in opposition to the master's will and against his orders, though by mistake, the master can not be held criminally responsible. This rule is of general application, though subject to some real or apparent exceptions" (citing numerous authorities).

Commonwealth vs. Stevens, 11 L. R. A., 357, 358.

We are aware that District Judge Rudkin in O. W. R. & N. Ry. Co. vs. United States, 213 Fed., 688, arrived at a different conclusion with reference to the construction of the statute, but we do not feel that his decision is either controlling or persuasive in the case at bar, for it was impossible of attainment in harmony with any accepted rules of construction of penal law, and this court (9th C. C. A.) upon review of the case did not see fit to affirm the decision of Judge Rudkin upon the theory thus announced by him, but quite properly under the facts of the case held (in 223 Fed., 596-599), that in view of the fact that the officers of the railroad company charged with the duty of providing

operators left a man on duty at a continuously operated station under such circumstances that he would have to remain until someone was furnished to relieve him, and no one was furnished to relieve him within the nine hour period, that on the *facts* it was not a harsh application of the letter of the statute to hold that the railroad company had knowledge of all of the acts of all of its officers and agents with respect to the excessive employment of Longabaugh, and in conclusion stated:

"It seems to us that upon the admitted facts the railroad company was charged with actual notice of Longabaugh's excessive service."

It cannot be claimed, therefore, that the questions here presented have been heretofore in any manner decided or passed upon by this court.

III.

THE COURT ERRED IN PRESUMING THE DEFENDANT GUILTY, AND IN RENDERING JUDGMENT ON THE PLEADINGS, AND IN SO DOING DENIED THE DEFENDANT THE EQUAL PROTECTION OF THE LAWS, AND DUE PROCESS OF LAW.

There is no positive evidence that the master caused or permitted the employee to work overtime, but, on the case as submitted, the averment of the answer, to the effect that the master did not cause or permit the violation, must be taken as true. That the master knew that the employee was working overtime (though it could not prevent it), is not a matter of fact, but is a purely statutory presumption; and on this presumption you can not base the presumption that the master caused

or permitted the act to be done, for it is well established law that "a presumption can be legally indulged only when the facts from which the presumption arise are proven by direct evidence, and that one presumption can not be deduced from another."

Note to A. T. & S. F. R. Co. vs. Baumgartner, 10 A. & E. Annotated Cases, p. 1096, and cases cited, including: Manning vs. Hancock Life Ins. Co., 100 U. S., 693. 100 U. S., 693.

Also 10 R. C. L., p. 870, and cases reviewed.

The reason for the rule is stated in U. S. vs. Ross, 92 U. S., 281, 23 L. Ed., 709, as follows:

"They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves The law requires an open, presumed. visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. * * * * A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption."

While it is true that it is within the province of the legislature to enact that proof of one fact shall be prima facie evidence of another, which is the main fact in issue, the inference must not be arbitrary, but there must be a rational relation between the two facts.

In Bailey vs. Alabama, 219 U. S., 238-239, Mr. Justice Hughes, quoting from the opinion of the court written by Mr. Justice Lurton in Mobile, Etc., Ry. Co. vs. Turnipseed, 219 U. S., 35, said:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is (only) essential that there should be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So also it must not under guise of regulating the presentation of evidence operate to preclude the party from the right to present his defense to the main facts thus presumed. It is apparent that a constitutional prohibition cannot be transgressed indirectly by a creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumption is not a means for escape from constitutional restrictions."

The Bailey case, it will be recalled, involved the construction of a provision of the Alabama code which provided that any person who with intent to injure or defraud his employer should enter into a contract in writing for the performance of any act of service, and thereby obtain money or other personal property from such employer and with like intent and without just cause refuse or fail to perform the service, should on conviction be punished by a fine in double the damage suffered, and that the refusal to perform the service should be prima facie evidence of intent to defraud the landlord. Under the protection of this statute a sys-

tem of peonage was being fostered and Bailey was prosecuted and convicted and in due course the proceedings reached the Supreme Court of the United States on Writ of Error. In holding that the legislature of Alabama could not consistently with due process of law enact such legislation, the court said:

"The law of the state would not permit him to testify that he did not intend to injure or defraud. Unless he were fortunate enough to be able to command evidence of circumstances showing good faith he was helpless. He stood stripped by the statute of the presumption of innocence and exposed to conviction of fraud upon evidence only of breach of contract and failure to pay.

"It is said that we may assume that a fair jury would convict only where the circumstances indicated a fraudulent intent. * * * * The normal assumption is that the jury will follow the statute and acting in accordance with the authority it confers will accept as sufficient what the statute expressly so describes."

See also, Luria vs. U. S., 231 U. S., 8, 58 L. Ed., 101.

Under the construction given in the statute by the lower court, the knowledge with which the defendant was charged was not confined to that of the officers and agents theretofore designated by the statute, or within the meaning or intent thereof, but was held to be the knowledge of the employe himself, and from this the court conclusively presumed either that he had required or permitted himself to violate the statute, or that some officer or agent had required or permitted him to violate the statute, and thereupon closed the door of all

defense, and denies to the railroad company the right to show that no officer or agent within the meaning of the statute had either required or permitted the employe to commit the offense charged.

Upon the presentation of this case in the lower court it was urged that the most that could be claimed under any circumstances for the words of Section 3 providing that "in all prosecutions under this Act the common carrier shall be deemed to have knowledge of all acts of all its officers and agents," within constitutional limitations, was that a presumption be created or a prima facie case made by showing that an employe had worked in excess of the period of lawful service prescribed by Congress. That the case was so presented is fairly deducible from that portion of the opinion of the court appearing at page 27 of the transcript. It is also apparent, we think, from the language employed that the court recognizes itself to be suffering from the necessarv embarrassment of being required to deny the defendant the benefit of that portion of the statute enacted for its protection, in order to uphold the contention of the government, for the decision could be arrived at only, by, first, conclusively presuming that the carrier had knowledge of all acts of all "employees" as well as all officers and agents; and, secondly, that the carrier was precluded from showing that the employe had not been required or permitted by any officer or agent to exceed the hours of lawful service, and out of considerations of expediency denied to this defendant the due process of law and equal protections of the laws guaranteed to it by Section 10 of Article 1 and the fifth and fourteenth amendments to the Constitution of the

United States by refusing to apply those universal and firmly established principles of construction to which the defendant was entitled, and which have been heretofore cited. In doing this the court said:

"It is doubtless true that so interpreted the act is rigorously and may now and then operate harshly upon the carrier, but, upon the other hand, it is apparent that upon the view urged by the defendant it would be a much less efficient means of accomplishing the purpose for which it was designed."

We will concede at once that the statute certainly would be much less efficient for purposes of conviction if the carrier were permitted to present its defense, and show that it had not required or permitted the violation of hours, but we cannot conclude it that was the "manifest purpose" of Congress in so enacting it to conclusively charge the carrier with the knowledge of all employees, and deprive it of the right to be heard in its own defense. If it had been the intention of Congress to penalize the railroad company for the voluntary and unauthorized violation of hours by that human factor, the employe, the same as it did in the Safety Appliance Law with reference to those instrumentalities without volition such as automatic coupler, or other standard safety appliance, it could very easily, and presumably would have framed the hours of service law in language permitting of no doubt, and instead of providing that any common carrier or officer or agent requiring or permitting an employe to remain on duty in excess of the hours therein prescribed, could have provided that whenever any agent or employe should remain on duty in excess of the hours therein provided the carrier should be subject to a penalty. This was not done, however,

and presumably out of consideration of a number of cogent reasons as follows: First, while Congress could within its constitutional authority make the carrier an insurer of the sufficiency and efficiency of Safety Appliances, it could not make it responsible for the criminal act or violation of the statute by an employe without the knowledge, authority or consent of the corporation; secondly, to conclusively presume the carrier to have knowledge and to have required and permitted the act would not only deprive it of the right to defend, but such construction would obviously impute to the carrier something which it had not and could not by any means place itself in a position of obtaining unless it should employ men to constantly watch each employe; thirdly, had Congress intended to have conclusively charged the carrier with the knowledge of all employes as well as with the knowledge of all officers and agents, and intended that one term should be as broad as the other, it would have provided the penalty for the violation of hours of service by employes, and would not have left the door open for employes out of malice or ill-will, or any other reasons that might inspire them, to violate the hours of service with impunity, and conclusively bind the carrier to submission to a penalty therefor, although the corporation should not in fact have or possess that knowledge which the law has always recognized it must have through its administrative officers or agents, or some person acting by its authority in order to charge it with a criminal offense. To quote from the brief of the learned counsel for the Plaintiff in Error in Case No. 2470, heretofore decided by this court, but on a different state of facts.

"Suppose the Government desired to prosecute one of (the employee's) superiors for the violation of the hours of service act, would proof of mere over-service be sufficient? Obviously not. We submit that in a given case the same quantum of proof required to convict the superior officer (officer or agent) is necessary before a conviction of the carrier can be claimed. For when it is shown by proof that the official or agent knew of the over-service and failed to prevent or stop it, then the statute imputes that knowledge to the carrier. A case which binds one convicts the other."

"This statute does not denounce the voluntary service of an employe of a railroad company, but if there shall be voluntary service on the part of an employe plus knowledge of an officer or agent the carrier is bound."

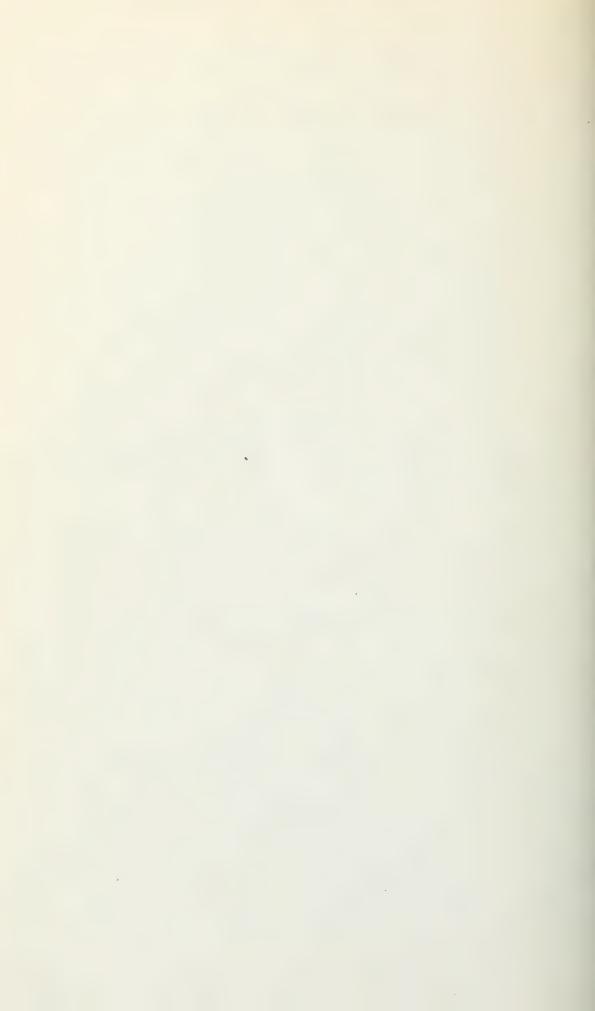
Without such knowledge the corporation cannot be conclusively or otherwise deemed to have required or permitted a violation of law.

That the judgment should be reversed is

Respectfully submitted,

GEO. H. SMITH, H. B. THOMPSON,

Attorneys for Plaintiff in Error.



United States

Circuit Court of Appeals

For the Ninth Circuit

OREGON SHORT LINE RAIROAD COMPANY, a Corporation,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error in the United States District Court for the District of Idaho, Eastern Division.

GEORGE H. SMITH, H. B. THOMPSON,

Attorneys for Plaintiff in Error.

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Attorneys for Defendant in Error.

No. 2716.

In the United States Circuit Court of Appeals for the Ninth Circuit.

OREGON SHORT LINE RAIROAD COMPANY.

a Corporation,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error in the United States District Court for the District of Idaho, Eastern Division.

Since the question involved in this hearing is concise and free from complications, and since such question arises solely upon the pleadings in the case, which pleadings are set out in full in the transcript (pp. 7-24) and a fair summary of the same given in the statement of the case appearing in the brief of Plaintiff in Error, we make no further statement, but proceed directly to our argument and authorities.

ARGUMENT.

The position taken in the brief of plaintiff in error, stated concisely, is as follows: In case of services rendered by any employe of a common carrier in violation of the Hours of Service Act, the carrier cannot be held liable therefor except the following be either proved or admitted, to-wit: (1) That some officer or managing agent of such carrier, under whose supervision such employe worked, had actual knowledge of the excess service performed by such employe; and (2) such officer or managing agent actively consented after the acquirement of such knowledge to such excess service by such employe.

In support of this position, plaintiff in error, at page 6 of its brief, sets forth nine propositions of law which serve as the frame work of the argument which follows. As to some of these propositions we have no criticism to make when the same are applied to an appropriate state of facts. Thus, as to those propositions numbered 2, 3, 4, 7, and 8, when considered in the light just suggested, we would accede to the same as perfectly acceptable principles. This is probably true, also, as to proposition 5, as we understand it; it is perhaps a trifle vague, and, as such, is rather a generalization than a principle, But we submit that, as shown in our detailed analysis which follows, the propositions of plaintiff in error above referred to are entirely beside the question here involved and have no proper application to this state of facts. Before going into detail and making a citation of authorities it has seemed that it may be not inappropriate to state in an introductory way certain propositions of law which are so universally known and accepted as to require no citations in support thereof.

It must be borne in mind in the examination of a question of this character, that a common carrier is in very many respects subject to regulations and rules of law which would not in any way be permissible if the subject of such rules and regulations were a mere individual citizen acting in his private capacity, or even a corporation engaged in business of a private nature. A common carrier is permitted to reap and enjoy the fruits of an enterprise which is inherently a public utility. A common carrier performs a public service, and is, therefore, held to be to a considerable extent under legislative control exercised for the benefit of the public which makes possible the utility controlled by such carrier. And so, in many instances, a common carrier is held to a more rigid performance of the duties imposed upon it by law than is a person or corporation acting in a merely private capacity. To that end a carrier is deprived at times of the defenses which would be open to an individual.

In regard to the specific contention made by plaintiff in error, that a carrier cannot constitutionally be precluded from showing a lack of knowledge on its part, or on the part of the officer or managing agent in charge, of services performed by an employe in violation of the terms of such act, that contention is not borne out either by the specific decisions in point or by the general or common law governing the rights and liabilities of a common carrier. For instance, it is, and always has been, the universally accepted rule that a common carrier insures the safe carriage and delivery of freight or baggage entrusted to it, and that in the event of loss or injury thereto the carrier is liable absolutely and cannot be heard to assert its lack of negligence or due diligence in the handling and transportation of the articles consigned to it. Under this rule, a railroad company is liable for all acts of all its agents relating to a consignment of freight. If loss or injury occurs, it is entirely beside the question for the carrier to deny knowledge of the act or acts responsible, or to deny consent thereto, or to allege that such act or acts were performed not only without the knowledge or consent of the carrier but in direct violation of the carrier's specific orders to its employes. And certainly

there is nothing unconstitutional or even unreasonable in the requirement which holds a carrier to insure that its employes will render service within the provisions of the Hours of Service Act, and to hold it liable for violations of the rule of such Act by such employes. The two rules are exactly analogous so far as the legal right of the carrier is concerned. And while the one is calculated to protect a property interest merely, the other is specifically designed to accomplish a far higher purpose, the protection of human life and limb. (See Title, Act of March 4, 1907, 34 Stat., 1415).

T.

THE ACT: ITS NATURE AND PURPOSE.

The Act under consideration (34 Stat. 1415) is a remedial Act intended to promote the safety of the traveling public, and the portions thereof applicable to the case at bar are as follows:

- I. "That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employes," etc. (Section I).
- 2. "That no operator, train dispatcher, or other employe who * * * * receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all * * * stations continuously operated night and day," etc. (Section 2).
- 3. "That any such common carrier * * * * permitting any employe to * * * remain on duty in violation of the second section hereof, shall be liable to a penalty" * * * "In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents." (Section 3).

Plaintiff in error throughout its entire brief has treated the question presented as thought the Act above quoted were criminal, and an action brought thereunder were conducted in the same manner and subject to the same rules of procedure as a criminal prosecution. In fact, the conclusion arrived at in that brief cannot be reached on any other assumption. It has required a most technical application of the most stringent rules of procedure designed for the protection of the defendant in a criminal prosecution. That the argument of plaintiff in error is without foundation in this respect is shown by the following authorities upon that point:

"This is not a criminal statute, and therefore is not governed by the rule of strict construction. It is rather a remedial statute which should be so construed, if its language permits, as to best accomplish the protective purpose for which it was enacted. Obviously, that purpose was to protect the safety of employes and the traveling public by prohibiting hours of service which presumably result in impaired efficiency for discharging their important duties. The end to be attained by the law is a a guide to its interpretation."

United States v. Atlantic Coast Line R. Co., 211 Fed. 897. (C. C. A. 4th Circuit).

"This law was passed to meet a condition of danger incidental to the working of railroad employes so excessively as to impair their strength and alertness. It is highly remedial; and the public, no less than the employes themselves, is vitally interested in its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its purposes may be effected. The recovery is by a civil action, and the rules governing civil procedure apply."

See also

United States vs. Southern Ry. Co., 202 Fed. 828. (C. C. A. 8th Circuit).

Delano, et al., vs. United States, 220 Fed. 635 (C. C. A., 7th Circuit).

United States vs. Boston & M. R. Co., 168 Fed. 148.

Nor is plaintiff in error correct in attempting to find a distinction, inherent in their natures, between the Act in question and the Safety Appliance Act. (Brief of Pl. in Error, p. 21).

The two are closely analogous as to both form and purpose. The same method of construction should be followed as to each in order to effect the purpose for which the two Acts were intended.

"Of a closely analogous statute—the Safety Appliance Law—the Supreme Court, in Johnson vs. Southern Pacifice Co., 196 U. S. I, has said: 'The primary object of the Act was to promote the public welfare by securing the safety of employes and travelers and it was in that aspect remedial, while for violations a penalty of \$100.00, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the Act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs; that rule not requiring absolute strictness of construction.'"

United States vs. Kansas City Southern Ry Co.. 202 Fed. 828, supra.

It follows, therefore, that the decisions heretofore rendered touching the purpose and construction of the Safety Appliance Law should be given great weight in arriving at the ultimate purpose which the Congress intended to be served by the Act under consideration. Concerning the Safety Appliance Law the Supreme Court has said:

"The Congress, not satisfied with the common law duty and its resulting liability, has described and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described."

And further,

"The obvious purpose of the Legislature was to supplement the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

St. Louis. I. M. & S. R. Co. vs. Taylor, 210 U. S. 281, 52 L. Ed. 1061.

"It cannot then be doubted that this Court in the Taylor Case considered the scope and effect of the Safety Appliance Act of Congress as directly involved in the questions raised in that case, and it expressly decided that the provision in the second section relating to automatic couplers imposed an absolute duty on each corporation in every case to provide the required couplers on cars used in interstate traffic. It also decided that non-performance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers or reasonable diligence in using them and ascertaining their condition from time to time. That the Taylor Case, as decided by this Court, has been so interpreted and acted upon by the Federal Courts generally, is entirely clear, as appears from the cases cited in the margin."

And further,

"In effect the contention is that the present action for a penalty is a criminal prosecution, and that the defendant cannot be held guilty of a crime when it had no thought or purpose to commit a crime, and endeavored with due diligence to obey the Act of Congress. This contention is unsound, because the present action is a civil one."

Chicago, B. Q. R. Co. vs. United States, 220 U. S. 559, 55 L. Ed. 582.

See also,

Delk vs. St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590.

It therefore fully appears that the case at bar is a civil action with all which that term implies, based upon an Act of Congress which is highly remedial in its nature and which should be liberally construed, if its language is subject to construction at all, in order to give it full effect in serving the purpose for which it was designed.

Plaintiff in error has presented what it conceives to be the

proper construction to be placed by this Court upon the Hours of Service Act. Before any Act of a competent legislative body is subject to construction by the judiciary, it must appear that the language employed in the body of such Act is uncertain, vague, or ambiguous in some respect. If the language so used is plain and unambiguous the Act is not subject to construction or interpretation, but it becomes the duty of the judiciary to give effect to the plain meaning of such language.

"To get at the thought or meaning expressed in a statute,* * * * the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involved no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted." etc.

"So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

"Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation."

And quoting with approval Law vs. People, 87 Ill. 395:

"Nor are we justified in resorting to strained construction or astute interpretation, to avoid the intention of the framers of the constitution, or the statutes adopted under it, even to relieve against individual or local hardships. If unwise or hard in their operation the power that adopted can repeal or amend, and remove the inconvenience. The power to do so has been wisely withheld from the courts, their functions only being to enforce the laws as they find them enacted."

Lake Co. vs. Rollins, 130 U. S. 662, 32 L. Ed. 1060.

We think it follows necessarily from the foregoing citations that the demand of plaintiff in error for a strict construction of the Act in question and an application of the rules of criminal procedure to the case at bar, must fail. We will endeavor in the further pages of this brief to point out sufficient reason why its proposed interpretation of the Hours of Service Act should not be adopted by this Court.

11.

THE ACT IMPOSES ABSOLUTE LIABILITY.

The ralroad company, plaintiff in error, contends (1) that the only knowledge which should be imputed to it under the Act is knowledge of its managing officers and agents as distinguished from its employes; (2) that, therefore, unless it can first be shown that some managing officer or agent had actual knowledge of a violation of the Act, no knowledge whatever of such violation can be imputed to the carrier; (3) further, that neither the carrier nor any managing officer or agent thereof would be liable under the Act, even if knowledge of a violation were had by such officer or agent, unless the one having such knowledge had actively consented to the excess service constituting such violation.

In support of propositions (1) and (2) above stated, the railroad company in its brief attempts to point out an intended distinction between "officer or agent" and "employe," as used in the Hours of Service Act. (Brief, pp. 9-12). It reasons that since, under the terms of the Act, a superior officer or agent might become personally liable by requiring or permitting a workman under his supervision to render excess service, therefore such superior officer or agent is not himself an "employe." Just what process of reasoning produces this conclusion, we are not able to understand. The Act itself defines "employes" (Section 1) to mean "persons actually engaged in or connected with the movement of any train." A yard master or train dispatcher, under whose orders other men work, if "connected with the movement of any train," is as truly an "employe" as any of the men under him. Excess service on his part is, beyond the peradventure of a doubt, a violation of the Act as truly as such service by one of his men. In his status as "employe," the carrier is responsible for his actions as much as for those of any other. Also, in his status as a superior in charge of other men, he can himself become liable for the penalty provided in the Act. Just why this latter possibility frees him from the sweeping and inclusive definition of the term "employe," does not appear.

Nor is there any virtue in the company's attempted distinction between the terms "agent" and "employe." The double status of the superior agent of the company just pointed out does not depend upon the use of the term "agent" as indicating his one capacity, and "employe" as indicating his other. The two terms, as ordinarily used, are interchangeable, and either would be appropriate to indicate such person's connection with the railroad company. As one authorized to attend to the company's business and in its pay, he is an "agent" or an "employe," under the usual use of the terms, as one may choose to call him. And so also is each and every man working under him. It is true that by the terms of the Hours of Service Act there is, at least by implication, a division of the agents of a carrier into two classes. This division, however, is not in any sense based upon the distinction which plaintiff in error attempts to point out in its brief. That classification is rather, that those agents of the carrier engaged in or connected with the movement of any train shall be distinguished from other agents of the carrier not so occupied, by the term "employe." Under this classification, a superior or managing agent of the carrier may or may not be called an "employe," using the term in its more limited sense defined by the Act, depending upon the nature of his services. But there is most certainly no distinction made in the Act, by implication or otherwise, between managing agents on the one hand and the workmen of the company on the other. And so, to revert to our original illustration, the yard master or train dispatcher, if connected with the movement of trains, is an employe and may make the carrier liable under this Act by rendering excess service. He may also become personally liable for the penalty of the Act, although the men under him may

not; the reason for this is to be found in the fact that he is vested with supervisory authority and the others are not. Both alike are agents of the company, and both are "employes" under the definition given in the Act. The one has certain discretion and the power to give orders, and so may require or permit a workman to render excess service. The workman, on the other hand, has no such authority, his duties being largely ministerial, and so may not himself require or permit another to render such excess service.

It follows that when the Act was worded (Section 3) to provide that "in all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents;" every agent, superior or inferior, discretionary or ministerial, was equally included. The carrier is charged with knowledge of "all acts of all its officers and agents." This language is as plain and unambiguous as language may be. Its meaning is simple, certain, and fully expressed. No room is left for construction or "astute interpretation."

Lake County vs. Rollins, 130 U. S. 662, supra.

Therefore, there is neither necessity nor authority to hold that Congress intended by the phrase "all agents" merely "administrative or superior officers and agents, with the power and authority to require or permit the employes to go, be, or remain on duty." (Brief, p. 10). On the contrary, it was plainly intended that the carrier should be conclusively charged with the knowledge of the agent rendering service in excess of the hours permitted by the Act as well as with any other knowledge which any other agent might have concerning such violation.

In support of proposition (3), supra, the railroad company (Brief. pp. 12-16) contends that, in addition to knowledge of

the excess service by a managing officer or agent of the carrier, the Act implies that such managing officer or agent must also have actively consented or authorized such service. It is argued that the word "permit" denotes positive consent on the part of the person charged. To this end, numerous cases are cited, nearly all of them pertaining to criminal actions in which it was attempted to hold a master or principal criminally liable for the act of his servant or agent, a husband liable for the act of his wife, etc.

As we have already pointed out, this action is in no sense a criminal proceeding and for that reason alone the citations of plaintiff in error are distinctly not in point. Nor does a common carrier stand on equal footing, as regards its legal rights, with an individual. We have no doubt that Congress, had it so chosen, could lawfully have enacted a criminal statute similar to the one under discussion and could have under such statute deprived the carrier of any defense based upon lack of knowledge or due diligence on its part. (See Chicago, B. & O. Ry. Co. vs. United States, 220 U. S. 559 supra, at page 578). But the fact is, it did not do so and we are therefore not concerned with the rules of procedure and presumptions of innocence which obtain in a criminal prosecution. Stripped of these, the railroad company's brief touching the use of the word "permit" is left a mere superstructure of argument with no authority to support it.

Having stated in a preliminary way the construction of the Hours of Service Act contended for by plaintiff in error, together with what we believe to be its true meaning, we now set out authorities specifically in point which we believe effectually sustain our position.

Neither the construction of the Act, nor the reasoning in support thereof, by plaintiff in error, are novel. In *United*

States vs. O.-W. R. & N. Co., 218 Fed. 925, decided by the learned District Judge for the District of Oregon in December, 1914, the identical propositions and argument advanced by plaintiff in error were discussed and disposed of in favor of the interpretation which we have placed upon the Act in question. We cannot do better than to quote the language of the Court:

"In arriving at this conclusion, counsel insist that the Act makes a distinction between officers and agents of the carrier on the one hand and the employes on the other, and that the knowledge imputed to the carrier by the third section is only the knowledge of its officers and agents, and not of its employes. * * *

"It is at once apparent that the Act makes all officers and agents in appointive authority, or with supervision as to the time of service, as well as the carrier itself, amenable to its provisions, as it declares that 'any officer or agent thereof, requiring or permitting any employe to * * * remain on duty,' etc., shall be liable to the penalty prescribed. It may very well happen that an officer or agent may have appointive power or authority, or have delegated supervision as to the hours of service, who may himself be an employe whose time of service is regulated by the Act. For instance, we may suppose that a train dispatcher is authorized to appoint and fix the time of service of telegraph operators. In such a case the train dispatcher would be amenable to the law for permitting the operator to remain on duty overtime, and yet some other superior officer would be amenable for permitting the train dispatcher himself to remain on duty overtime. While the supposed case is probably not the fact, yet it affords a demonstration that the act, by intendment, was not designed to distinguish between officers and agents on the one hand and employes on the other, for it prescribes that the term 'employes' * * * shall be held to mean persons actually engaged in or connected with the movement of any train' - a special, but very broad, signification.

"But the imputed knowledge is 'of all acts of all its officers and agents.' The term 'agents,' it would seem, is here used in its broadest sense, because it comprises all agents.

"'Agency, in its broadest sense, includes every relation in which one person acts for or represents another by his authority.' 31 Cyc. 1189.

"And again the learned author of the article entitled 'Principal and Agent,' in the same work, says:

"The relations of principal and agent and master and servant are frequently confused. In general the principles governing the rights, duties, and liabilities growing out of the two relations are the same, and to determine whether a given relation is one of agency or of service is of no consequence. This results from the fact that the law of principal and agent is an outgrowth and expansion of the law of master and servant." 31 Cyc. 1191.

"It would therefore seem to follow that knowledge by the employe, in whatsoever capacity engaged, if connected with the movement of any train, under the act is tantamount to knowledge of the carrier, and this even if it be the knowledge only of the employe remaining on duty overtime.

"But I am not disposed to rest the case on this reasoning alone. The act is so nearly analogous in the respect under consideration to the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1913, Sec. 8605-8612]) as to make an authoritative construction of the latter act decisive of the former. The language of the second section of the latter act is that 'it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact'—language of identical import with that used in the statute under consideration." (Italics purs).

"The Supreme Court of the United States had before it, in St. Louis & Iron Mountain Ry. vs. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, the question of the liability of a railroad company not equipping its cars with drawbars of the standard height above the rails, as required by section 5 of the act, and the court held, speaking through Mr. Justice Moody, that:

"The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

"Thus it rejected the defense sought to be interposed that the company had exercised reasonable care to keep the drawbars at a standard height, as not revelant under the statute. The result was to impose upon the carrier an absolute duty to keep its cars equipped as required by the act, and especially by the particular section 5.

"The appropriate construction of the act came again before the Court in C. B. & Q. Ry. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582, which arose

under section 2 thereof. The precise question considered is stated by the Court as follows:

"'Does the Act of Congress in question impose on an interstate carrier an absolute duty to see to it that no car is hauled or permitted to be hauled or used on its line unless it be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars?'

"It was insisted that the question was not involved by the Taylor Case, and therefore not decided. But the Court held that it was not only so involved, but that the question was properly decided. See, also, Delk. v. St. Louis & San Francisco R. R., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590, a companion case, decided at the same time.

"So that, as it pertains to section 2 of the act, as well as the entire act, it has become the settled construction of the Supreme Court that there is thereby imposed upon the railroad an absolute duty, and the penalty prescribed cannot be escaped by the exercise of reasonable diligence. Without else, considering the similarity of the language of the two acts, and the purpose designed to be subserved by each, which is the protection of the public, as well as the protection and relief of employes, these cases would seem to be decisive of the present.

"The primary significance of the word 'permit' implies knowledge of the thing suffered or allowed to be done; but, as if to allay all question as to its appropriate meaning and application under the present statute, it is specifically declared that the carrier shall be deemed to have had knowledge of all the acts of all its officers and agents, thus rendering the statute in question much more explicit touching what was intended than the safety appliance statute.

"I conclude, therefore, that the duty imposed by the act is absolute, and that reasonable care or want of knowl-

edge on the part of the officers and agents of the carrier constitutes no defense to a charge of requiring or permitting an employe to be or remain on duty overtime."

And in United States vs. O.-W. R. & N. Co., 213 Fed. 688, the same conclusion, to-wit, that the hours of Service Act imposes an absolute liability upon the common carrier which cannot be evaded by any disclaimer of knowledge or intent, was reached in the Eastern District of Washington. In that case the Court said:

"It is urged that the words 'require or permit' imply consent or knowledge on the part of the employer, and this is perhaps their common significance; but the word 'permit' also means a failure to prohibit by one who has the power and authority to do so, and in my opinion the term is here used in the latter sense."

In Funk and Wagnall's New Standard Dictionary of the English Language the primary definition of the word "permit" is given as follows:

"To allow by tacit consent or by not hindering; take no steps to prevent; consent tacitly to; suffer; as, to permit oneself to be wronged."

And accordingly this Court (223 Fed. 596) affirmed the decision of the District Court for the Eastern District of Washington, last cited above. This Court (Cit., p. 598) stated the question on that hearing to be, "Was he permitted to be on duty in excess of that time?" (Italics ours). Then follows a statement of the facts of the case showing that at the station there in question there had been previously employed three telegraph operators beside the employe, Longabaugh, whose excess service was the basis of that action. That one of the operators had been discharged and that Longabaugh had been directed to work six hours as a telegraph operator and three hours as a station agent, thus supplementing the two nine hour shifts of the two remaining operators so as to fill out the full twenty-four hour period, leaving him an additional period of three hours in which to work as station agent. That the exigencies of the situation were such that Longabaugh found himself required to perform the duties of station agent for a period of twelve hours instead of three hours as directed. This Court concluded, under these facts, that to hold the company liable was not even a harsh application of the statute, for the reason that the company would seem to be charged with actual notice of the excessive service which the exigencies of the situation required of Longabaugh.

Aside from the law of the case, it would seem that the case at bar furnishes sufficient basis for the same conclusion on the question of a harsh application of the statute. It is admitted that for four days, successive but for one exception, the employe performed a full shift as operator and thereafter performed other duties about the station. While the particular emergency which made this necessary is not set out, it is certainly a fair inference that circumstances rendered this excess service necessary. It is surely not to be inferred that, after rendering a full day's service as operator, he continued on duty about the station for several hours from choice. And it is further alleged in each count of the answer that the excess services were performed without the knowledge of any officer or agent of the company except the employe in question, so that if any inferences are to be included, the Court should infer that he was alone at the station at the time the excess service was rendered. Such being the case, the carrier must have known that fact, continued as it was over a period of four days. If not, certainly it should have known it, which is equivalent to knowledge. It would appear, therefore, that this case rests on very much the same footing as the Longabaugh case, so far as the complaint of harshness is concerned.

In further support of the general conclusion reached, we call attention to San Pedro L. A. & L. R. Co. vs. United States, 213 Fed. 326, decided by the Circuit Court of Appeals of the Eighth Circuit, to the effect that the command of this statute is laid on the carrier as employer, and not on the employe, and that as a highly remedial statute it should be liberally construed in such a manner as best to effect the purpose which it is 12 tended to serve.

It has been pointed out in a number of authorities already cited that this Act is analogous to the Safety Appliance Act and that the construction placed upon that Act by the highest tribunal is effective to determine the purport and meaning of the Hours of Service Law. As stated in the opinion of the District Court for the District of Oregon, fully quoted above the language of the two Acts is almost identical, even to the use of the word "permit." That that language is appropriate for the statement of an absolute liability, has been decided by the United States Supreme Court in the following cases: St. Louis, I. M. & S. R. Co. vs. Taylor, 210 U. S. 221, supra; C., B. & Q. R. Co. vs. United States, 220 U. S. 559, supra; Delk vs. St. Louis & S. F. R. Co., 220 U. S. 580, supra.

It is contended by plaintiff in error that a carrier cannot be rendered liable for the voluntry or deliberate act of an employe. While this question is merged into, and determined by, the decisions holding the liability of the act to be absolute, we wish to call attention to a case involving this particular contention:

"You are instructed that the law lays an unqualified duty upon a railroad company to keep its coupling devices in a certain prescribed condition, and, if an employe of such company deliberately puts such devices in another condition, which condition the law undertakes to prevent, then the company is liable to respond under the penalty for the unlawful act of the employe."

United States v. Southern Pacific Co., 167 Fed. 699.

The lack of knowledge and due diligence on the part of the carrier so vigorously and ably urged in the brief of plaintiff in error has no place in an action brought to recover the penalty provided by the Hours of Service Act, except that it is to be considered by the Court in fixing the amount of that penalty.

"* * * the penalty is a deterrent, not compensation. The amount is not measured by the harm to the employes, but by the fault of the carrier * * *"

M. K. & T. R. Co. vs. United States, 234 U. S. 112, 58 L. Ed. 144.

In conclusion, we submit that in a case of service by an emplove in excess of the hours prescribed by the Act in question, the liability imposed upon the carrier is absolute, and that no issue of knowledge or permission is open to the carrier upon which to base a defense. The occasional harshness of the Act is no concern of the Courts. If any other construction were to be placed upon this Act its enforcement would become impossible and it would be a dead letter upon the statute books. A carrier, by issuing a general order as in this case, would be immune from the terms of the Act for the reason that it would be a practical impossibility to prove actual knowledge and active consent on the part of the managing officers or agents of the carrier. This case very evidently arose, as nearly all cases under this Act arise, not out of the deliberate and wilful command or encouragement of any managing officer or agent of the carrier, but out of a condition which had been caused or permitted to arise, to-wit, a working force at a given point insufficient in number to handle the volume of business at that point without working in excess of the periods prescribed by the Act. It is not unreasonable or harsh to require the carrier to anticipate such a situation and to guard against violations of the law arising therefrom. Foresight and preparedness against emergencies are requisite in every business of any considerable proportions. And it is far better that, by the exaction from offending carriers of the penalty of this Act, the instances where by lack of such foresight and preparation excess service of employes becomes necessary should be reduced to a minimum, than that the Hours of Service Act should be rendered impotent by construction and the life and limb of employes and travelers thereby jeopardized.

We respectfully submit that the judgment of the trial Court should be affirmed.

J. L. McCLEAR,

United States Attorney for the District of Idaho.

J. R. SMEAD,

Assistant U. S. Attorney for the District of Idaho. Residence, Boise, Idaho.

PHILIP T. DOHERTY,

Sp. Ass't U. S. Att'y., Washington, D. C.

United States

Circuit Court of Appeals

For the Ninth Circuit.

W. W. KEYES, Trustee of the Estate of CHE-HALIS RIVER LUMBER & SHINGLE COMPANY, a Corporation, Bankrupt, Appellant,

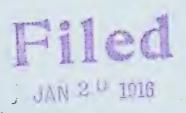
VS.

W. C. DAVIE,

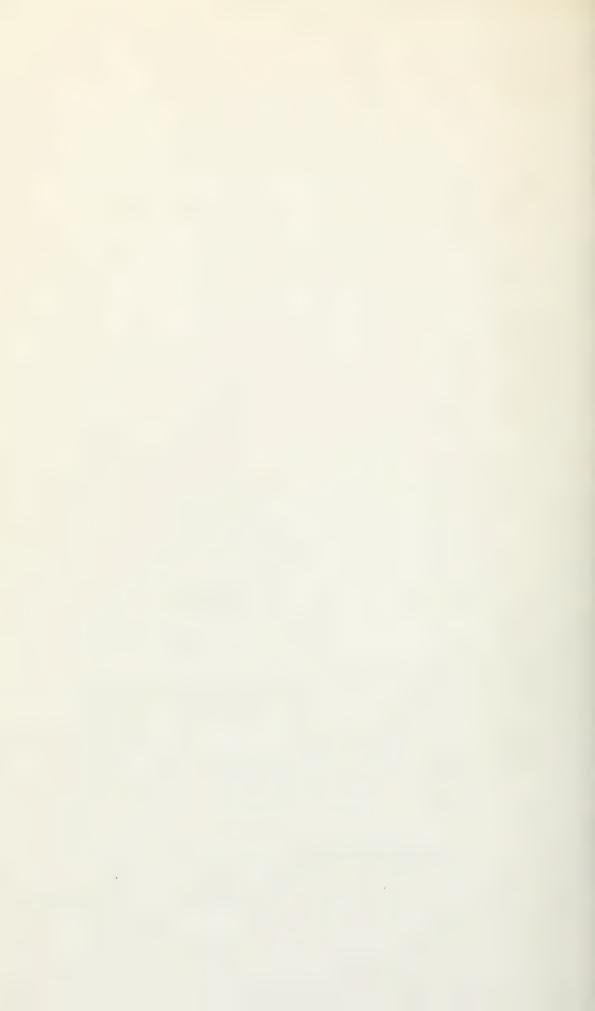
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington,
Western Division.



F. D. Monckton,



United States

Circuit Court of Appeals

For the Ninth Circuit.

W. W. KEYES, Trustee of the Estate of CHE-HALIS RIVER LUMBER & SHINGLE COMPANY, a Corporation, Bankrupt, Appellant,

VS.

W. C. DAVIE,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington,
Western Division.



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Names and Addresses of Attorneys.

RAYMOND J. McMILLAN, Esquire, Bank of California Building, Tacoma, Washington, and

ERNEST K. MURRAY, Esquire, Bank of California Building, Tacoma, Washington,

Attorneys for the Trustee W. W. Keyes, and Appellant.

VAN M. DOWD, Esquire, Fidelity Building, Tacoma, Washington,

Attorney for Claimant W. C. Davie, and Appellee. [1*]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1655.

In the Matter of CHEHALIS RIVER LUMBER & SHINGLE COMPANY, a Corporation,

Bankrupt.

Stipulation as to Record of Appeal.

Whereas, in the above-entitled proceedings the trustee, W. W. Keyes, did on the 15th day of December, 1915, duly file in the District Court of the United States for the Western District of Washington, a petition for appeal, a citation and assignment of errors, which said appeal was allowed by order of the District Court upon said day.

NOW, THEREFORE, it is hereby stipulated that the record to be certified to this court by the clerk of the United States District Court for the Western

^{*}Page-number appearing at foot of page of original certified Record.

District of Washington on said appeal shall consist of the following:

- 1. This stipulation.
- 2. Proof of claim of W. C. Davie.
- 3. Objections of trustee thereto.
- 4. Transcript of testimony taken at hearing before referee.
- 5. Opinion of referee.
- 6. Order of referee overruling objections.
- 7. Petition for review, omitting exhibit "A."
- 8. Referee's certificate of review.
- 9. Opinion of District Judge.
- 10. Order affirming referee's order. [2]
- 11. Assignment of errors.
- 12. Petition for appeal and order thereon.
- 13. Citation.

It is further stipulated and agreed that there may be omitted from the foregoing in each case the title of the court, the title of the cause and all verifications and indorsements, and

[Stipulation as to Certain Facts.]

It is further stipulated and agreed for the purpose of the record that the following facts are true: That the above-named bankrupt was a corporation engaged in the manufacture and sale of lumber and shingles, and that its average capacity and output was one hundred thousand feet of lumber and one hundred twenty thousand shingles per day, and that at the time of bankruptcy and prior thereto approximately two hundred twenty men were employed by the bankrupt.

Dated Tacoma, Washington, December 17th, 1915.

RAYMOND J. McMILLAN, E. K. MURRAY, Attorneys for Trustee-Appellant. VAN M. DOWD,

Attorney for Claimant-Respondent.

(Filed Dec. 18, 1915.) [3]

Proof of Claim in Bankruptcy.

At Centralia, in said District of Washington, on the 7th day of July, A. D. 1915, came W. C. Davie, of Centralia, in the county of Lewis, in said District of Washington, and made oath and says that the Chehalis River Lumber & Shingle Co., the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is, justly and truly indebted to said deponent in the sum of five hundred eighty-seven and 55/100 (587.55) dollars; that the consideration of said debt is as follows: services as manager of the Chehalis River Lumber & Shingle Co. during the six months next preceding the commencement of proceedings herein, a bill of items of which said account is hereto annexed; that deponent claims a prior lien against all lumber and shingles belonging to said company at the time of the filing of said petition and the proceeds thereof, under and by virtue of the statutes of the State of Washington, to wit, R. B. 1149 and R. B. 1162, and considers the filing of notice of said lien waived by virtue of an order of this Court in this cause dated October 7th, 1914; that no part

of said debt has been paid; that there are no set-offs or counterclaims to the same, that no judgment has ever been recovered thereon, that no note has been received for said account; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

W. C. DAVIE,

Creditor.

Dobit Orodit

Subscribed and sworn to before me this 7th day of July, A. D. 1915.

GEO. C. ELLSBURY,

Notary Public in and for the State of Washington, Residing in Centralia in said State. [4]

Statement.

Centralia, Wash., Sept. 23, 1915.

Mr. W. C. Davie,

In Account With

Chehalis River Lumber & Shingle Co.

Bills not paid promptly, subject to sight draft without notice.

Interest chargeable on all accounts after date.

Date	•		Depit.	Crean.
Sept.	23,		1,142.45	
Apr.	30, By	Salary @ 300.00 1	per mo.	300.00
May	31,	46		300.00
Jun.	30,	. 66		300.00
July	31	4.6		300.00

Aug. 31,	66			300.00
Sept. 23,	66			230.00
			1,142.45	1,730.00 1,142.45
(Eilad I	J Q 1015 \	[K]	Balance	587.55

(Filed Jul. 8, 1915.) [5]

[Title of Court and Cause.]

Objections to Claim of W. C. Davie.

Comes now W. W. Keyes, the trustee herein, and objects to the claim of W. C. Davie, filed herein on the 8th day of July, 1915, for the sum of \$587.55, in so far as the same purports to be a lien claim against the lumber and shingles of the bankrupt on hand at the time of the filing of the petition for adjudication herein, and in so far as the same purports to be a claim entitled to priority of payment from the funds realized from the sale thereof, for the reason that said claimant was the president and general manager of the above-named bankrupt and the owner of all but a few of its shares of capital stock, and for the reason that said claim does not state facts sufficient to constitute a lien against said lumber and shingles or a claim entitled to priority of payment from the proceeds of sale thereof, within the meaning of the bankruptcy act or of the laws of the State of Washington.

W. W. KEYES,

Trustee.

RAYMOND J. McMILLAN, E. K. MURRAY, Attorneys for Trustee. (Filed Jul. 13, 1915.) [6]

Transcript of Testimony.

Hearing on Objections of Trustee to Preferred Claim of W. C. Davie.

Before: Hon. R. F. LAFFOON, Referee in Bank-ruptcy.

July 12, 1915, 2:30 P. M.

Present: W. C. DAVIE, Claimant,
VAN M. DOWD, Atty. for Claimant,
E. K. MURRAY, Atty. for Trustee.

Mr. MURRAY.—The trustee objects to the claim of Mr. Davie as a preferred claim because he is the general manager and president and owner of practically all the company's shares of stock; and his claim does not come within the statute of the State of Washington allowing a lienor priority of payment.

[Testimony of W. C. Davie, for Claimant.]

Mr. W. C. DAVIE, being first duly sworn, on oath testified as follows:

Direct Examination by Mr. MURRAY.

- Q. You are the claimant in this proceeding?
- A. Yes, sir.
- Q. What position did you hold with the bankrupt

(Testimony of W. C. Davie.)

prior to its bankruptcy? A. I was manager.

- Q. You are also president of the company?
- A. Yes, sir.
- Q. How much of the capital stock did you own?
- A. All but one share.
- Q. What did your duties as manager consist of?
- A. I managed the whole property. I looked after the making of the orders; the collection of the money, and the getting of the timber, and the buying of the timber, and manufacturing the lumber and the shingles. [7]
 - Q. You had charge of everything? A. Yes, sir.
 - Q. Did you have a woods' foreman under you?
 - A. Yes, sir.
 - Q. Did you have a log foreman? A. Yes, sir.
 - Q. Did you have a mill foreman? A. Yes, sir.
 - Q. And a shingle mill foreman? A. Yes, sir.
- Q. You made the financial arrangements with the bank?
- A. I did everything; I was the whole thing. I hired the men and I discharged them.

Cross-examination by Mr. DOWD.

Q. Is it a general rule for a lumber company the size of the Chehalis River Lumber & Shingle Company to have a general manager? A. Yes, sir.

Mr. MURRAY.—I will concede that.

Mr. DOWD.—If you had resigned would it have been necessary to have a general manager?

- A. Yes, sir.
- Q. Was it part of your duties to handle the correspondence? A. Yes, sir.

(Testimony of W. C. Davie.)

Q. Your duties required your presence in the office a great portion of the day?

A. Yes, sir. I was in the office, in the woods, and out soliciting orders.

Q. What was your salary as manager? [8]

A. Three hundred dollars per month.

REFEREE.—Who fixed your salary, Mr. Davie?

A. The salary was fixed by the board prior to my going there. The former manager got \$300 per month, and I continued with it.

Q. Who was on the board?

A. Dr. Francis, Mrs. Davie and myself. We fixed the salary to a previous matter at \$300 per month. When I took charge I continued it on.

Q. When you took charge you owned all the shares but one. Who owned that?

A. Mr. Dysart. My wife had some. I do not know how much.

Q. You and your wife held all but one share controlled by Dysart? A. Yes, sir.

Q. Dysart was manager of the bank?

A. Yes, sir, and secretary of the company.

Q. Did Dysart get any salary?

A. No, sir. When we reorganized that time and the other man went out the bank had some pull that pulled the other man out bodily. Dysart got the stock and delivered all but one share, which I was to get when we pulled out of debt.

Mr. MURRAY.—You had assistance in the office?

A. Yes, sir. A bookkeeper and stenographer.

Witness excused. [9]

Memorandum of Decision of Referee.

This matter came on for hearing upon the exceptions filed by the trustee to the claim of W. C. Davie filed herein in the sum of \$587.55 for salary earned by him as general manager of the bankrupt corporation within the six months next prior to the adjudication herein, claiming priority of payment therefor. The trustee objects to the claim for priority of payment upon the ground that the claimant was the president, and general manager, and the owner of all the capital stock except a few shares.

When Mr. Davie took charge as general manager it was under a reorganization of the company. The old board was made up of Dr. Francis, Mrs. Davie and Mr. Davie, the claimant. Dr. Francis was general manager at a salary of \$300 per month. The new board was made up of Mr. Davie, Mrs. Davie, and Mr. Dysart, with Mr. and Mrs. Davie owning all the capital stock but one share held by Dysart. Dysart was secretary and Davie president and general manager. As general manager Davie was to have the same salary as his predecessor, Dr. Francis. The salary was fixed by the old board and not changed by the new board. (Transcript, pp. 2 and 3.)

Treating the corporation as an entity and as distinct from the owners of its shares, and its officers, as considered by Judge De Haven in In Re Swain Co., 194 Fed. 749, and the state supreme court in Cors & Wegener vs. Ballard Iron Works, 41 Wash. 390–4, Mr. Davie in the capacity of general manager was a servant of the corporation, and entitled to

claim priority for his six months' salary as claimed by him. My holdings heretofore have been that a general manager could not claim priority of [10] payment under section 117, Title 309, Pierce's Code, unless he had filed his notice of lien as provided in the following section, section 119, title 309; but I have been overruled on that point, and I find that the courts have held the other way. Cors & Wegener vs. Ballard Iron Works, supra, follows section 125, Title 309, Pierce's Code, which section dispenses with the filing of the notice of lien where insolvency proceedings intervene before the expiration of the time in which a lien notice must be filed.

Mr. Davie filed his claim herein following the decision in Re Johnson Creek Lumber Co., No. 1771, relying upon that decision. There is no difference between the two cases except that Mr. Davie was an officer of the bankrupt, and its chief shareholder. But a similiar situation existed as to the chief claimants in Cors & Wegener vs. Ballard Iron Works, Supra.

I think Mr. Davie's claim is within the law and the facts and that he should have priority of payment thereof.

Tacoma, Wash., July 30, 1915.

R. F. LAFFOON, Referee in Bankruptcy.

(Filed Jul. 30, 1915.) [11] [Title of Court and Cause.]

Order (of Referee Overruling Objections).

This matter heretofore having come on for hearing on the objections of W. W. Keyes, the trustee

herein, to the claim of W. C. Davie, filed herein for the sum of \$587.55, in so far as the same purports to be a lien claim or claim entitled to priority of payment and the counsel for said trustee and said claimant having filed briefs herein and the court having fully considered the matter, now on motion of said claimant's attorney, it is

ORDERED that the objections of said trustee to said claim in so far as the same purports to be a lien claim or claim entitled to priority of payment be and the same is hereby overruled and disallowed and said claim allowed as a lien claim herein for the sum of \$587.55.

Dated August 7th, 1915.

R. F. LAFFOON, Referee in Bankruptcy.

(Filed Aug. 6, 1915.) [12]

To the Honorable R. F. LAFFOON, Referee in Bankruptcy:

The petition of W. W. Keyes, the trustee, herein respectfully represents:

That on the 5th day of August, 1915, an order, the copy of which is hereunto annexed, and marked exhibit "A," and made a part hereof, was made and entered herein. That such order was and is erroneous in that it overrules the objections of your trustee to the claim of W. C. Davie, filed herein for the sum of \$587.55, in so far as the same purports to be a lien claim or claim entitled to priority of payment.

WHEREFORE, your trustee feeling aggrieved because of such order believes that the same should

be reviewed as provided in the Bankruptcy Law of 1898 and General Order XXVII.

W. W. KEYES,
Trustee

(Filed Aug. 7, 1915.) [13]

[Title of Court and Cause.]

Certificate on Review.

To the Hon. EDWARD E. CUSHMAN, District Judge:

I, R. F. Laffoon, the referee in bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceedings, an order, a copy of which is annexed to the petition hereinafter referred to, was made and entered on the 7th day of August, 1915.

That, on the 7th day of August, 1915, W. W. Keyes, the trustee in such proceeding, feeling aggrieved thereat, filed a petition for a review, which was granted.

I hereto attach my memorandum of decision, which states the evidence as succinctly as it is possible for me to state it.

That the question involved and presented for review is whether or not W. C. Davie, the general manager of the bankrupt corporation, is entitled to have priority of payment for salary claimed by him as accruing during the six months next prior to the institution of the bankruptcy proceedings herein, he being at the same time the principal owner of the bankruptcy corporation.

I hand up herewith, for the information of the judge, the following: (1) Petition for review; (2) order therein; (3) memorandum of decision; (4) transcript of testimony; (5) objections to claim; (6) claim of W. C. Davie; (7) brief of trustee on objections to claim; (8) brief of claimant.

Dated, Tacoma, August 11, 1915.

R. F. LAFFOON, Referee in Bankruptcy.

(Filed Aug. 11, 1915.) [14]

[Title of Court and Cause.]

Memorandum Decision, Filed November 2, 1915.

RAYMOND J. McMILLAN, E. K. MURRAY, for Trustee.

VAN M. DOWD, for Claimant.

CUSHMAN, District Judge.

This matter is before the Court for review of the referee's order allowing, as preferred, the claim of W. C. Davie, general manager of the bankrupt corporation, on account of services performed within six months prior to bankruptcy.

Similar questions have been before the Court heretofore in the matter of the Northwest Brick & Lime Company, Johnson Creek Lumber Company and Wisconsin Lumber Company.

The order of the referee is approved and affirmed on the authority of the decision in these cases and that of Judge Hanford In re Lawler (110 Fed. 135) and Cors & Wegener v. Ballard Iron Works (41 Wash. 390). The Circuit Court of Appeals of this circuit has not yet ruled whether the statute of the State providing for priority of payment in insol-

vency proceedings under the State law is supplanted by the bankruptcy act dealing with the same subject. Blessing v. Blanchard (223 Fed., 35 at 38). [15]

[Title of Court and Cause.]

Order Affirming Referee's Order.

This matter heretofore having come on for hearing on the petition of W. W. Keyes, the trustee herein, for review of the order of the referee in bankruptcy, dated July 30, 1915, allowing the claim of W. C. Davie, filed herein for the sum of \$587.55, in so far as the same purports to be a lien claim or claim entitled to priority of payment, and the counsel for said trustee and said claimant having filed briefs herein and the Court having fully considered the matter, now on motion of the attorney for said claimant, it is

ORDERED that the order of the referee in bank-ruptcy, dated July 30, 1915, allowing the claim of W. C. Davie for the sum of \$587.55 in so far as the same purports to be a lien claim or claim entitled to priority of payment be and the same is hereby affirmed, to which said trustee excepts, and his exceptions are allowed.

Dated this 7th day of December, 1915.

EDWARD E. CUSHMAN,

Judge.

(Filed Dec. 7, 1915.) [16]

[Title of Court and Cause.]

Assignment of Errors.

Comes now W. W. Keyes, trustee and appellant, and files the following assignment of errors:

First. That the United States District Court for the Western District of Washington erred in concluding that the statutes of the State of Washington providing for priority of payment to labor claimants in insolvency proceedings was not supplanted by the provisions of the Bankruptcy Act of 1898 dealing with the same subject.

Second. That the Court erred in concluding that the claimant, W. C. Davie, who was the president, one of the directors and the principal stockholder of the bankrupt corporation, was entitled to a lien under and by virtue of the laws of the State of Washington for his services rendered to said bankrupt as its general manager.

Third. That the Court erred in finding that the proof of claim filed by the claimant W. C. Davie stated facts sufficient to entitle him to a lien or priority of payment.

Fourth. That the Court erred in making its order affirming the order of the referee allowing the claim of W. C. Davie as a lien and priority claim and overruling the objections of the trustee thereto. [17]

WHEREFORE, the trustee prays that the order of the District Court of the United States for the Western District of Washington be reversed and that this cause be remanded for such further proceedings as are consistent with law and justice.

RAYMOND J. McMILLAN, E. K. MURRAY,

Attorneys for Trustee.

(Filed Dec. 15, 1915.) [18]

[Title of Court and Cause.]

Petition for Appeal to Circuit Court of Appeals from Order Allowing Lien Claim and Order Allowing Appeal.

To the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court for the Western District of Washington:

W. W. Keyes, the trustee in the above-entitled proceedings, conceiving himself aggrieved by the final order entered in this proceeding on the 7th day of December, 1915, affirming the order of the referee to whom this proceeding was referred allowing the claim of W.C. Davie as a lien and priority claim for the sum of \$587.55 and overruling the objections of said trustee thereto, does hereby petition for an appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his appeal may be allowed and said order reversed, and a citation granted directed to said W. C. Davie, claimant, commanding him to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the records, proceedings and evidence in said proceeding, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

W. W. KEYES,

Trustee.

RAYMOND J. McMILLAN, E. K. MURRAY,

Attorneys for Trustee.

(Filed Dec. 15, 1915.) [19]

[Order Allowing Appeal.]

The foregoing appeal is hereby allowed. Dated December 20th, 1915.

EDWARD E. CUSHMAN,
District Judge. [20]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America, Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing and attached to be a true, full and correct transcript of the papers and proceedings in the case of Chehalis River Lumber & Shingle Company, Bankrupt, No. 1655, lately pending in this Court, as required by the stipulation of counsel filed in this cause, as the originals thereof appear on file in this Court, at Tacoma, in the District aforesaid.

I further certify and attach thereto the original Citation issued in this cause.

I further certify that the following is a full, true

and correct statement of all expenses, costs, fees and charges incurred and paid in my office, by and on behalf of the appellant herein, for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit:

ATTEST my hand and the seal of the United States District Court, at Tacoma, in this District, this 21st day of December, A. D. 1915.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington, Deputy Clerk. [21]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1655.

In the Matter of CHEHALIS RIVER LUMBER & SHINGLE COMPANY, a Corporation,

Bankrupt.

Citation on Appeal.

United States of America,—ss.

The President of the United States to W. C. Davie, Greeting:

You are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, California, on the 20th day of January, 1916, pursuant to the appeal duly obtained and filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein you as claimant are appellee and W. W. Keyes, trustee, is the appellant, to show cause, if any there be, why the final order in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf and to do and receive what may appertain to justice to be done in the premises.

WITNESS the Honorable EDWARD E. CUSH-MAN, United States Judge for the Western District of Washington, on the 20th day of December, 1915.

[Seal]

EDWARD E. CUSHMAN,

District Judge.

Due service of within citation admitted this 20th day of December.

VAN M. DOWD,

Attorney for Claimant and Appellee.

[Endorsed]: No. 1655. United States District Court, Western District of Washington, Southern Division. In the Matter of Chehalis River Lbr. & Shingle Co., a Corporation, Bankrupt. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 20, 1915. Frank L. Crosby, Clerk. By E. C Ellington, Deputy.

[Endorsed]: No. 2717. United States Circuit Court of Appeals for the Ninth Circuit. W. W. Keyes, Trustee of the Estate of Chehalis River Lumber & Shingle Company, a Corporation, Bankrupt, Appellant, vs. W. C. Davie, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Western Division.

Filed December 27, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

W. W. KEYES, Trustee of the Estate of Chehalis River Lumber & Shingle Company, Bankrupt,

Appellant,

No. 2717

VS.

W. C. DAVIE,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT

RAYMOND J. McMILLAN, ERNEST K. MURRAY, Attorneys for Appellant.



United States Circuit Court of Appeals

For the Ninth Circuit

W. W. KEYES, Trustee of the Estate of Chehalis River Lumber & Shingle Company, Bankrupt,

Appellant,

No. 2717

VS.

W. C. DAVIE,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

The bankrupt was a corporation engaged in the manufacture and sale of lumber and shingles. Its daily output was one hundred thousand feet of lumber and one hundred twenty thousand shingles. It employed approximately two hundred twenty men. (Record p. 2). W. C. Davie, the claimant and

appellee here, was the corporation's General Manager, employed at a salary of \$300.00 per month. He was one of its trustees and its President. owned all but one share of its capital stock. His duties as General Manager consisted of general direction and supervision of the entire activities of the corporation. He oversaw the making of sales, the collection of moneys, the buying of timber, the logging and transportation, the manufacturing of lumber, the manufacturing of shingles, the handling of correspondence and office work, the making of banking and financial arrangements, and the hiring and discharging of employes. (Record pp. 6-8.) Mr. Davie had under him a logging foreman, a woods foreman, a sawmill foreman and a shingle mill foreman. In the office were a bookkeeper and a stenographer. Mr. Davie hired and fixed the compensation of everyone employed by the corporation except himself. He was employed by the Board of Trustees, consisting of himself, his wife and his attorney, and his salary fixed by them. (Record pp. 6-8.)

The corporation was adjudged a voluntary bankrupt on September 24th, 1914. At that time there was owing to Mr. Davie as the balance of his salary, earned within the six months next prior thereto, the sum of \$587.55. For this amount he filed a claim in this proceeding, asserting a lien and priority therefor under and by virtue of the laws of the State of Washington. (Record pp. 3-5.) To this claim, in so far as it asserted a lien and

priority, the trustee objected for the reason that the claim did not state facts sufficient to entitle the claimant thereto. (Record pp. 5-6.) It was the trustee's contention that the claimant was not one entitled to a lien and priority under the statutes of the State of Washington, giving the same to a person performing labor in the operation of a corporation of the class of which the bankrupt was one, and further that said statutes were supplanted by the provisions of the National Bankruptcy Act dealing with the same subject. The Referee, after a hearing, overruled these objections. (Record pp. 9-11.) A review of the order entered thereon was granted to the trustee and taken to the District Judge (Record pp. 11-13), who made the order, which is complained of on this appeal, affirming the Referee's order (Record pp. 13-14). Thereupon this appeal was perfected. (Record pp. 15-20.)

ASSIGNMENTS OF ERROR.

The following assignments of error are relied upon:

First: That the United States District Court for the Western District of Washington erred in concluding that the statutes of the State of Washington providing for priority of payment to labor claimants in insolvency proceedings was not supplanted by the provisions of the Bankruptcy Act of 1898 dealing with the same subject. (Record p. 15.)

Second: That the Court erred in concluding that the claimant, W. C. Davie, who was the President, one of the directors and the principal stockholder of the bankrupt corporation, was entitled to a lien under and by virtue of the laws of the State of Washington for his services rendered to said bankrupt as its General Manager. (Record p. 15.)

Third: That the Court erred in finding that the proof of claim filed by the claimant, W. C. Davie, stated facts sufficient to entitle him to a lien or priority of payment. (Record p. 15.)

Fourth. That the Court erred in making its order affirming the order of the Referee allowing the claim of W. C. Davie as a lien and priority claim and overruling the objections of the trustee thereto. (Record p. 15.)

ARGUMENT.

The third and fourth assignment of errors are general, and are necessarily included in the first and second assignments and will be considered therewith and not otherwise.

The case of Wintermote, trustee, v. MacLafferty, number 2718, on appeal before this court at this term, and submitted herewith, is similar to this case, both as to facts and the law applicable thereto, and we believe should be considered herewith.

We will consider the second assignment of error first.

The appellee is not one entitled to a lien and priority under the provisions of the statutes of the State of Washington giving the same to a person performing labor in the operation of a corporation of the class of which the bankrupt was one.

The court below allowed appellee's claim under Section 1149, Remington & Ballinger's Annotated Codes and Statutes of Washington (Laws 1897, Chapter 43, Section 1). That section reads:

"Every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, sawmill, lumber or timber company, shall have a prior lien on the franchise, earnings, and on all the real and personal property of said person, company or corpora-

tion, which is used in the operation of its business, to the extent of the moneys due him from such person, company or corporation, operating said franchise or business, for labor performed within six months next preceding the filing of his claim therefor, as hereinafter provided; and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien."

Section 1150 id. (Laws 1897, Chapter 43, Section 2), reads:

"No person shall be entitled to the lien given by the preceding section, unless he shall, within ninety days after he has ceased to perform labor for such person, company or corporation, file for record with the county auditor of the county in which said labor was performed, or in which is located the principal office of such person, company or corporation in this state, a notice of claim, containing a statement of his demand, after deducting all just credits and offsets, the name of the person, company or corporation, and the name of the person or persons employing claimant, if known, with the statement of the terms and conditions of his contract, if any, and the time he commenced the employment, and the date of his last service. and shall serve a copy thereof on said person, company or corporation within thirty days after the same is so filed for record."

Section 1153 id. (Laws 1897, Chapter 43, Section 5), reads:

"Whenever a receiver or assignee is appointed for any person, company or corporation, the court shall require such receiver or assignee to pay all claims for which a lien could be filed under this chapter, before the

payment of any other debts or claims, other than operating expenses."

No lien was filed by appellee in accordance with the provisions of Section 1150, and if he is entitled to priority of payment it is by virtue of the provisions of Section 1153.

Appellee was General Manager of the bankrupt corporation, exercising absolute control over its affairs. He was President, one of three trustees, and owner of all but one share of its capital stock. In view of these facts, was he a person performing "labor" and entitled to priority within the meaning of the above statute? We believe that whether the statute be construed according to the ordinary force of its terms or according to the purpose of its enactment the answer must be in the negative.

First, what was the purpose of this enactment? Courts have repeatedly construed similar provisions in other states and they are uniform in holding that the obvious purpose is, as stated in the language of Bacon, J., in *Coffin v. Reynolds*, 37 N. Y. 640:

"To protect the classes most appropriately described by the words used, as those engaged in manual labor, as distinguished from officers of the corporation or professional men engaged in its service, in short, to afford additional relief to a class who usually labor for small compensation, to whom the moderate pittance of their wages is an object of interest and necessity, and who are poorly qualified to take care of their own concerns, or look sharply after their employers."

Again in People v. Remington, 52 N. Y. 329, it was said:

"This, like many similar statutes in this and other countries, was designed to secure the prompt payment of the wages of persons who, as a class, are dependent upon their earnings for the support of themselves and their families, and it was not designed to give preference to the salaries and compensation due to the officers and employes of corporations occupying superior positions of trusts and profits."

From these cases, and others which we will hereafter cite, it will be seen that there is sound reason, based upon public policy and welfare, why the wages and earnings of these persons in inferior and subordinate positions should be protected, but such reason does not apply to claims of the nature of that of the appellee herein. There are corporations, such as those enumerated in the statute above, much larger than was the bankrupt in the present case. The general manager of such corporations would draw a considerably larger salary, for instance, it might be \$20,000 per year. Then the amount which under the ruling of the court below would be preferred would be \$10,000. To so construe the statute is doing violence to the legislative intent. The result would be that the protection given would increase as the necessity therefor lessened, and that it would be greatest when the reason for which it was given was entirely lacking. The appellee in the present case was in control of the corporation's affairs and fully cognizant of its financial condition, and was undoubtedly in some degree responsible therefor. He was the owner of all but one of the shares of its capital stock, and looking through the corporate entity, was in fact carrying on his own business, and is now seeking to assert a lien and priority against what is in reality his own property. Courts of equity in the distribution of insolvent estates uniformly apply the maxim that "equality is equity." Under this principle, are not the creditors of a bankrupt, who became such at the solicitation of the appellee and who were undoubtedly not so well informed as to the company's financial condition as was he, entitled to at least an equal distribution in its assets as is the appellee?

In *Grubb-Wiley Grocery Co.* (D. C. Mo.), 96 Fed. 183, the court in defining the class described under Section 64b., cl. 4, of the National Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563), as "workmen, clerks and servants," said in this connection:

"Indeed, it would present a remarkable feature of the Bankruptcy Act, if the managing officers of a business corporation could vote themselves salaries ad libitum, and after, by their mismanagement, wrecking the company, and inviting an adjudication in bankruptcy, they could, to the exclusion of other creditors of the concern, whose money and property they had obtained on credit, come in as preferred creditors, to the exclusion of such general creditors. The act, in my judgment, admits of no such construction. Such an officer of the corporation being one of its board of managing directors and its general manager, certainly

was not in the mind of the lawmakers, and is certainly not within the spirit of the act, as a preferred creditor."

We next turn our attention to the terms which the statute employs to describe the class intended to be preferred. They are "persons performing labor." The basic word in this phrase is "labor." It is the performance of "labor" for which the priority is given. In one sense the word "labor" includes every form of human endeavor. It is in this sense that we speak of the "labor" of the statesmen for mankind. Needless to say this meaning is not that attributed to the word in common parlance. Its common and usual meaning, as defined in the dictionaries, is services of a manual, menial and mechanical nature, the compensation for which is small. It is services rendered by persons whom public policy demands should be secured and protected to the extent of their scant earning. One who performs "labor" is most appropriately described as a "laborer." The statutes of many states describe the class entitled to priority by terms of broader significance than does the statute of the State of Washington. In many the word "employes," of concededly broader scope, is used.

The most able discussion of who are included within the terms of these statutes, we believe, is in the case of *In Re Stryker* (N. Y. Ct. of App.), 53 N. E. 525. In that case the class entitled to priority was described as "employes, operatives and labor-

ers." The claims of a bookkeeper, a superintendent, a draughtsman, and two foremen were before the court. It was said in denying them:

"It is said that the applicants were employes of the corporation, and doubtless that assertion is correct. But the word employes would include every person in the service of the corporation without regard to his grade or rank or the nature of his duties. * * * * Although the word employes is used, yet the purpose of the statute was to protect mechanics, operatives or laborers from loss of their wages in the event of the insolvency of the corporation."

In Michigan Trust Company v. Grand Rapids Democrat, 113 Mich. 615, 71 N. W. 1102, 67 Am. St. Rep. 486, the statute of Michigan preferred "debts owing for labor." It was held that the services of the editors and reporters of a newspaper were not included.

In Richardson v. Langston & Crane, 68 Ga. 658, it was held that a clerk was not a "laborer."

In Pennsylvania & Delaware R. R. Co. v. Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189, it was held that a civil engineer was not a "laborer or workman." The court said in part:

"It is true, in one sense, the engineer is a laborer; but so is the lawyer and doctor, the banker and the corporation officer, yet no statistician has ever been known to include these among the laboring classes. We can not, therefore, even to save a meritorious claim, undertake to make a new classification, which must necessarily defeat the statutory intent."

In *Pullis Bros. Iron Co. v. Boember*, 91 Mo. App. 85, a superintendent employed at a salary of \$1,800 a year, whose duties were "to look after the patterns, the factory and about the building, and see that the men worked," was held not to be within the classification "employes and operatives."

In Re Directors of American Lace & Fancy Paper Co., 51 N. Y. Sup. 818, it was held that a general manager was not within the classification "employes, operatives and laborers." The court said:

"While it is extremely difficult to lay down any exact rule stating precisely what sort of services it comprehends, it may be said generally that the term 'employes' includes persons employed by corporations in comparatively subordinate positions who cannot be correctly described either as operatives or laborers; such, for example, as bookkeepers, clerks, salesmen and agents engaged at a regular compensation in soliciting orders for goods. No definition, however, can well be adopted which would be broad enough to include a person exercising such a control over the affairs of the corporation as was exercised by the appellant in this proceeding."

In Lewis v. Fisher (Md.), 30 Atl. 608, it was held that an attorney employed at a monthly salary was not within the classification "clerks, servants and employes."

In Casualty Insurance Co. case (Md.), 34 Atl.

778, it was held that an adjuster was not within the same classification.

The class entitled to priority under the present National Bankruptcy Act is described in Section 64b, cl. 4, thereof, as "workmen, clerks, travelling or city salesmen or servants." It has been held uniformly that such services as those of a general manager are not included.

In re Carolina Co-operage Co. (D. C. N. C), 96 Fed. 950.

In re Greenberger (D. C. N. Y.), 203 Fed. 583.

In re Albert O. Brown (D. C. N. Y.), 171 Fed. 281.

In re Crown Point Brush Co. (D. C. N. Y.), 200 Fed. 882.

In re Continental Paint Co. (D. C. N. Y.), 220 Fed. 189.

The same general principles under which a general manager is held not entitled to priority under the National Bankruptcy Act, would seem to exclude him under the state law. It can no more logically be said that the state legislature intended to protect the general manager than that congress intended to do so.

In Re Stryker, supra, it was said:

"It is significant to note that insurance and moneyed corporations are excepted from the operation of the statute. There was no reason for exempting these corporations, but for the fact, well known, that they do not employ "labor" in the ordinary sense of the word. The conduct of the business of these corporations requires a large clerical force, rated and organized according to the extent and necessities of the business. If it was intended to protect the claims of this class of employes there was no reason why all corporations should not be included within the scope of the statute."

The same criticism applies to the statute in question. The classes of business described are those in which "labor," within the common meaning of that term, is principally employed. If it was intended to protect such claims as that of appellee in this case, no reason exists why persons rendering services in all classes of business should not be included within the protection of the act. Certainly the claim of a clerk in a clothing store, employed at \$60 per month, is as much entitled to priority as that of the appellee here.

The court below relied chiefly upon In re Lawler, 110 Fed. 135, decided by Hanford, J., of the district court from which this appeal is urged. We believe that that decision is erroneous, and since it was rendered by the same court from which this appeal is taken, and was the basis for the present decision, we feel that we are in a sense appealing from that decision, too, and that our attitude toward it should be the same as toward the decision in the present case. The reason why that decision is correct, if it is correct, should be fully presented anew to the court by the appellee. The court in that case construes the word "employes," contained in the title

of the act, rather than the word "labor," by which the class entitled to priority is described, contained in the body thereof. Salesmen, however, generally occupy positions of a subordinate character, and their services are somewhat menial and clerical and easily distinguishable from those rendered by the appellee in the present case.

Hanford, J., in the decision of the *Lawler* case, applied what he termed a liberal construction under the provisions of Section 1147, Remington & Ballinger's Annotated Codes and Statutes of Washington. That section reads:

"The provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed with a view to effect their objects."

This liberal construction is directed only for the purpose of effecting the object of the act. If the object of the act is as uniformly stated by the courts, the same is in no way effected by a construction thereof including the claim of the appellee in this case. It is announced in Nunz v. Cumberland Gap Park Co. (Tenn.), 52 S. W. 999, 76 Am. St. Rep. 650, 47 L. R. A. 273, that the provision for liberal construction does not apply to the class of persons entitled to the priority, but to the other phases of the enactment, such, for instance, as to the property to which the lien given attaches.

It was said along this line in People v. Remington, 52 N. Y. 329:

"Legislation of this character confers upon a class of persons having a specific contractual relation with corporations, new and unusual privileges and securities at the expense of other creditors, whose distributive share of the assets is diminished. It is in derogation of the common law, and should not be extended to cases not within the reason as well as within the words of the statute. In the distribution of the assets of insolvent corporations by courts of equity, the maxim that equality is equity is a fundamental rule; and it is only by force of legislation that this principle can be departed from, and then only in favor of the class of creditors that come within the scope of the statute when fairly and reasonably interpreted."

Counsel for appellee cited several cases in the court below holding that architects were entitled to liens under mechanic's lien laws. These cases are easily distinguishable from the present case. The purpose of mechanic's lien laws is for the protection of material men and others. It has not as its sole object the protection of the laborer dependent upon his daily wage for his sustenance. Courts which have excluded the general manager under statutes similar to the one in question, have allowed the claims of architects. See *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262.

The question presented on this appeal has never been before the Supreme Court of the State of Washington, and its decisions throw no light thereon. The case of Cors & Wagner v. Ballard Iron Works, 41 Wash. 390, 82 Pac. 713, is cited by

the court below. In that case certain stockholders were employed by the corporation. At a meeting of such stockholders a resolution was adopted to the effect that they should receive certain compensation for their services, provided the business made that amount over and above all expenses. One of the stockholder employes was entitled "general manager." He received \$100 a month. was president. He received \$3.50 a day. Another was foreman. He received \$4.00 a day. The decision is without facts which might enable us to determine whether the services rendered were of a manual character or not. The amounts paid however, would indicate their manual character. It is significant that the court throughout its decision refers to these amounts as "wages." The creditors objecting to the allowance of the claims relied solely upon the proviso in the resolution that the wages should be paid in case the business made that amount over and above all expenses. The claimants contended, however, that the resolution from the time of its adoption was regarded as a nullity, and that the various stockholders were regularly credited with the amount of their wages upon the books of the company. The court passed upon the matter as one of fact, and so stated. It is noteworthy that the decision does not contain the citation of a single case.

The wages of laborers, mechanics and domestics has been the subject of protective legislation in this and other countries from time immemorial,

and the courts have on numerous occasions passed upon and construed the enactments with reference thereto. We have examined a great number of these decisions, and we believe that the construction placed upon the term "labor" by the court below is the broadest which it has ever received by any court, and that it is not in accordance with either the purpose of the act or the common usage of the terms.

We will now discuss the first assignment of error.

The statutes of the State of Washington under which appellee claims priority are supplanted by the provisions of the National Bankruptcy Act dealing with the same subject.

This question was before this court in the case of Blessing v. Blanchard, 223 Fed. 35. In that case it was held that the claim of a general manager of an automobile concern, employed at a salary of \$300 per month, was not entitled to priority under the statutes of the State of California. It therefore did not become necessary to decide whether the state statute was supplanted or not. The statutes of the State of Washington, above set forth, deal with the rank in order of payment of claims for labor. Section 64b., cl. 4, of the Bankruptcy Act deals with the same subject. Section 64b. provides:

"The debts to have priority, except as herein provided, and to be paid in full out of the bank-rupt estates, and the order of payment shall be * * * * (4) wages due to workmen, clerks, travelling or city salesmen or servants,

which have been earned within three months before the date of the commencement of the proceedings, not to exceed \$300 to each claimant; and (5) debts owing to any person who by the laws of the states or the United States is entitled to priority."

Appellee is not entitled to a lien under the state statute, for the reason that Section 1153, supra, provides the order of priority in the case of the appointment of a receiver and directs that such receiver shall pay them accordingly. This provision converts the inchoate right of lien into a priority and makes the same subsequent to operating expenses, which it would not otherwise be. The legislature undoubtedly deemed that the orderly administration of insolvent estates demanded that a multiplicity of suits by reason of foreclosure of liens should be avoided, and that a priority should be substituted for the unperfected lien right. If the priority thus given is introduced into the Bankruptcy Act it is by virtue of the provisions of Section 64b., cl. 5, supra. Now, congress having spoken specifically on the question of labor claims in Section 64b., cl. 4, can it be construed that a different and conflicting priority as to the same matter is introduced into the statute under the general language used in Section 64b., cl. 5? A well known rule of statutory construction would indicate not. See Suth. St. Const., Section 158.

The leading case on this question is *In re Rouse*, *Hazard & Co.* (C. C. A. 7th Cir.), 91 Fed. 96. In that case the bankrupt ceased doing business on Au-

gust 31, 1898. By the provision of the Bankruptcy Act no involuntary petition could be filed before November 1, 1898. When bankruptcy ensued the labor claimants were without the ninety-day priority period allowed by Section 64b., cl. 4. They asserted priority by virtue of clause 5 and a broader state statute.

The Circuit Court of Appeals denied priority under clause 5. It said:

"Our conclusion is that Congress having spoken specifically on the subject of priority of payment of labor claims, what it has said upon that subject expresses the particular intent of the lawmaking power, and that provision is not to be tolled or enlarged by any general prior or subsequent provision in that act. That which is given in particular is not affected by general words. So that the statute providing for the priority of payment of debts referred to in clause 5 must be construed to mean other debts and different debts than those specified in clause 4. We are not unmindful of the particular hardship which our conclusion, it is said, will work out. It arises from the fact that under the law proceedings in bankruptcy, except by voluntary act of the bankrupt, could not be commenced in time to fully protect these labor claimants. We regret that this is so. It is a misfortune arising from the provisions of the act, but to remedy this particular wrong we cannot override a recognized canon of construction of statute law."

A similar question was before the court in *Re Lewis* (D. C. Mass.), 99 Fed. 935. It was there said:

"It has been held that state laws, giving priority to wages, though included in the terms of section 64b., cl. 5, are yet ineffectual, because the whole matter of wages is dealt with and regulated by section 64b., cl. 4. In re Rouse (D. C.), 91 Fed. 514. In other words, although the laws of a state giving priority to certain debts are by section 64b., cl. 5, introduced into the scheme of the present bankrupt act, yet such state laws are so introduced only so far as the debts to which they give priority are not expressly dealt with as to priority in the bankrupt act itself. Where both a state law and the bankrupt act give priority to the same class of debts, the bankrupt act not only controls the two, but, by its express regulation of these priorities, excludes the state law altogether."

See Collier on Bankruptcy, 10th Ed. p. 912.

With reference to the same matter it was again said In *Re Shaw* (D. C. Pa.), 109 Fed. 782:

"The question has already been decided by the circuit court of appeals for the sixth circuit in Re Rouse, Hazard & Co., 1 Am Bankr. R. 240, 33 C. C. A. 356, 91 Fed. 96, in favor of paragraph 4, and the referee followed this de-I agree with the correctness of this ruling, which, indeed, seems to me to be scarcely susceptible of doubt. Paragraph 4 deals specifically with the allowance of claims for wages; and, while it is true that wages might be included under the general word "debts," used in paragraph 5, thus to include them would violate a well-known rule statutory construction. Having been fically dealt with in the paragraph immediately preceding, it is almost incredible that congress should straightaway proceed to deal with them again in a different fashion."

It was otherwise held in *Re Slomka* (D. C. N. Y.), 117 Fed. 688. Upon appeal the district court was reversed in *Re Slomka* (C. C. A. 2nd Cir.), 122 Fed. 630.

Similar rulings were had in:

In re Crown Point Brush Co. (D. C. N. Y.), 200 Fed. 882.

In re Crawford Woolen Co. (D. C. W. Va.), 218 Fed. 551.

The Bankruptcy Act is entitled "An act to establish a uniform system of bankruptcy throughout the United States." "Uniform," as used in this title, must mean uniform as between the several states. It expressly provides a "uniform" manner for the payment of labor claims. Congress undoubtedly had in mind in the enactment of this provision the various provisions of statutes in the several states with respect to this subject. It found them not to be in harmony either as to the persons entitled to priority, the amount for which priority was given, nor the limitation of time over which it extended. With this divergence in its knowledge congress spoke on the subject specifically and particularly and limited the amount and the time and fixed the class of persons entitled thereunder. It is not to be presumed that congress in the general provision immediately following intended to derogate from this express enactment. Congress must be presumed to have intended what it stated with particularity, rather than what might be inferred from the use of the general terms.

We believe that Section 64b., cl. 4, supplants the state statutes in the present case, and that, even though the court should conclude that appellee was entitled to priority under the statutes of the State of Washington, such statutes are not applicable.

It is respectfully submitted that the order of the court below allowing the appellee a lien and priority for the amount of his claim should be reversed.

> RAYMOND J. McMILLAN, ERNEST K. MURRAY, Attorneys for Appellant.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. W. KEYES, T. istee of the Estate of Chehalis River Lumber & Shingle Company, Bankrupt, Appellant.

VS.

W. C. DAVIE,

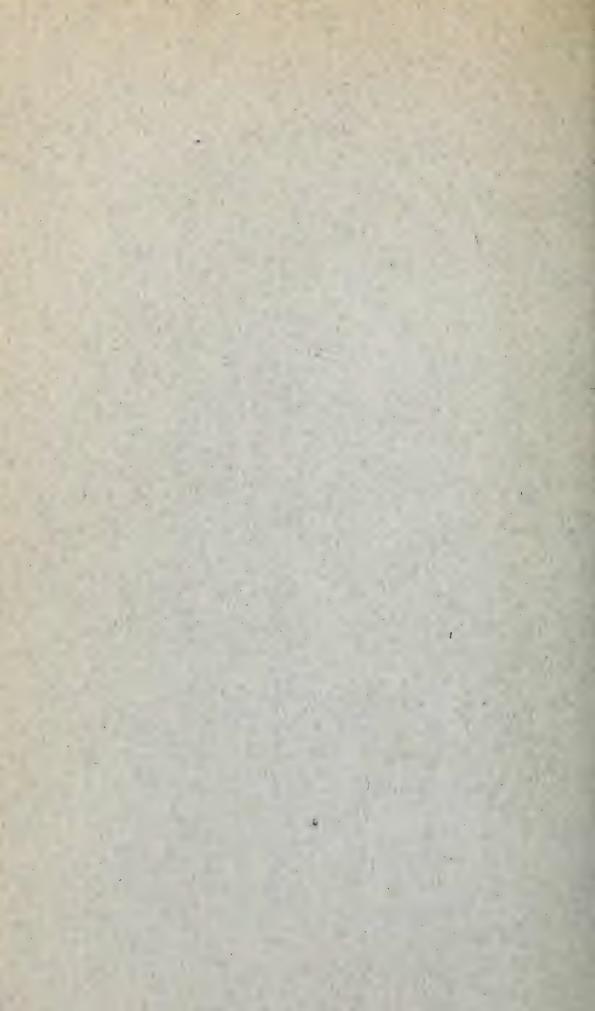
Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF OF APPELLEE

VAN M. Dowd, Attorney for Appellee.

1003 Fidelity Building, Tacoma, Wash.



No. 2717

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. W. KEYES, Trustee of the Estate of Chehalis River Lumber & Shingle Company, Bankrupt, Appellant.

VS.

W. C. DAVIE,

Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF OF APPELLEE

ARGUMENT.

The facts in the case have been well stated in appellant's brief. There now arises the question whether the appellee is entitled to a lien as general manager of a lumber company under and by virtue of the statutes of the State of Washington.

Washington lien laws are very broad in their wording, providing that "every person performing labor * * * in the operation of a lumber company," etc. In many other states the laws provide for liens to be given to "laborers and operatives" or to those doing "manual and mechanical labor;" and attention is called thereto for the reason that courts in the latter states have necessarily given stricter interpretations to the statutes than should be given in this case.

The Washington State Supreme Court, in *Graham* v. *Gardner*, 45 Wash. 648, at the bottom of page 651, says, in interpreting one of the Washington lien statutes similar to the one in question:

"Our view is that the sole intention of the legislature was to provide a lien for all employees in and about the mill directly performing labor in its operation. In other words, to include persons who, in the ordinary acceptation of the term, could be construed as mill employees."

The word "employee" in the ordinary acceptation of the term is, indeed, much broader than laborer or operative, the chief distinction being that employees include those using both manual and mental effort, while laborer or operative generally refer to manual effort only. In the case of *In re Lawler*, 110 Fed. 135, on page 137, Judge Hanford says:

"The word employee is of broad significance

including any person who gives his time for hire. It is my opinion that the title of this statute was not chosen in a careless manner, but with a deliberate purpose to aid in giving the enactment a true interpretation in accordance with the intention of the legislature to insure to the employees of the corporation in this state payment of their wages by subjecting the entire assets and franchise of every industrial corporation to a prior lien in favor of employees. * * * The statute does not in terms restrict its beneficence to persons performing labor in the operation of railways, canals, sawmills and factories, but is much more comprehensive. The lien is given to every person performing labor in the operation of any railway, * * * sawmill, lumber or timber company. Therefore, all participants, in carrying on the operation of the several kinds of companies mentioned are entitled to liens."

In conclusion, Judge Hanford says that the claimant was aiding in carrying on the operation of a lumbering company and is therefore entitled to a lien for his wages.

If the claimant therein was entitled, surely Davie, the appellee herein, was aiding in carrying on the operation of a lumber company and the law applies to him. Davie, as manager, likewise made sales of lumber, besides performing other duties attendant upon the general management. Record, p. 8.

In the case of Cors & Wegener v. Ballard Iron Works, 41 Wash. 380, 82 Pac. 713, three stockholders, working in the employ of said company,

one as manager and one as foreman of the foundry, were allowed their wages as preferred claims in a receivership proceeding. The only words designating the occupations show that William Darville, as acting manager, was to receive \$100 per month. In appellant's brief attention is called to the use of the word wages as signifying that the work was probably manual in its character; but the word salaries is also used, and nowhere in the case is it shown that the three claimants were working in capacities other than manager and foreman of the foundry.

In the case of *Gould* v. *McCormick*, 75 Wash. 61, plaintiff was allowed a lien for work in the preparation of plans for a building and, in addition, for the superindendence of the construction of the building.

In Vincent v. Snoqualmie Mill Co., 7 Wash. 566, the court allowed plaintiff's lien for labor performed upon and about the mill.

From the above decisions the underlying principle of Washington lien statutes seems to be the benefit derived from the work of the lien-claimant; and where an employee performs labor, in the operation of a sawmill, that results in a direct benefit to the mill, that employee is entitled to a labor lien. Indeed, the value of the property turned over to the trustee was directly affected by the labor of

appellee. Through his work, in soliciting orders, the trustee has obtained the accounts receivable. Manifestly, the manager of a mill performs labor in the operation of it as clearly as does the engineer who controls the machinery, the carrier who operates the carriage upon which the logs are taken to the saw, or as the man who wheels away the sawdust.

A manager of a mill was held to be an employee so that he might have a lien for his salary; as was likewise a foreman of a mill.

Conlee Lbr. Co. v. Ripon Lbr. & Mfg. Co., 29 N. W. 285.

The case last cited is on all fours with appellee's case, and the court held that being an active business man, who devoted his whole time to the business, taking charge of selling lumber and of measuring and piling it, made him an emlpoyee under the statute; and the fact that he was a stockholder did not weigh against him.

One who acts as an overseer and assistant superintendent in the repair of a mill is entitled to a lien.

Willamette F. & M. Co., v. Remick, 1 Or. 169.

Performing work as an architect and as a superintendent is "performing labor" of such character as to entitle one to a lien.

Taylor v. Gildsdorff, 74 Ill. 354.

In the case of Wetzel & T. Ry. Co. v. Tennis Bros. Co., 145 Fed. 458, the Court was called on to interpret a statute of West Virginia, which reads: "Every workman, laborer or other person, who shall do or perform any work or labor," etc. The judge's decision runs, in part, as follows (page 463):

"To supervise the construction of a street car line, as well individually as by and through assistants, is to *perform work and labor* and the person so rendering the same is entitled to the benefits of the mechanics' lien law of West Virginia."

The first and most common meaning of the word "labor," as given in Funk & Wagnall's New Standard Dictionary, is "Physical or mental effort, particularly for some useful or desired end." In the same authority the word "operation" is defined as "The act or process of operating," and also "the exertion or action of any form of power or energy, physsical, mechanical, mental or moral." The word "operate" means "to conduct or manage the affairs of; superintend; as to operate a railroad."

Any objection that appellant might raise that appellee was a stockholder and officer of the company and, therefore, barred from obtaining a lien, is disposed of in *In re Swain Co.*, 194 Fed. 749, wherein Judge DeHaven held that officers may become the creditors of a corporation and as individ-

uals may contract to perform clerical or manual labor.

Appellant, in attempting to ascertain the intention of legislatures and the purposes of lien statutes, has cited the case of Coffin v. Reynolds, 37 N. Y. 640, and has quoted freely to the effect that the real purpose was to protect laborers doing manual work. However, it will be noticed that the statute construed in that case was not a mechanics' lien statute but one making stockholders of corporations liable for debts of the corporation to laborers or servants. The purposes of the two statutes are discussed and distinguished in Stryker v. Cassidy, 76 N. Y. 50, in which it was held that the language (of a statute similar to the Washington statute) makes no distinction between skilled and unskilled labor or between mere manual labor and the labor of one who supervises, directs and applies the labor of others.

The next case cited is *People* v. *Remington*, 52 N. Y. 329, and later *Re Directors Am. Lace & F. P. Co.*, 51 N. Y. Supp. 818. The New York statute is different from the Washington statute in three essentials.

The New York statute uses the term "employees, laborers and operatives," and also the word "wages" wherever the amount due is referred to, and it excludes insurance corporations. The New York courts have held that the word "employees," taken

with the other two words, means manual laborers; and it is not used in the broad, ordinary sense of the word. The word "wages" was considered significant, as generally it is applied to manual laborers, while the exclusion of insurance corporations, where no actual manual labor is performed, only strengthened the court's opinion that the purpose of the statute was to protect manual laborers only. The Washington statute uses the terms "every person performing labor," and "moneys due," and it excludes no class of business. In re Stryker, 53 N. E. 525.

The reference to *Richardson* v. *Langston & Crane*, 68 Ga. 658, is not in point, as the word "laborer" is *nowhere* used in the Washington statutes; and the same argument applies to *Pa. & Del. R. R. v. Leuffer*, 84 Pa. St. 168.

Since appellee's claim is based on the wording of Section 1149, Rem. and Bal. Codes of Washington, and on Section 64 B (5), all authorities under Section 54 B (4) are consequently not in point. Nor should the cases of *In re Carolina Cooperage Co.*, 96 Fed. 950 and the three following, be considered.

The National Bankruptcy act has enumerated four classes of labor which are entitled to priority, while the Washington State Statute has included every person performing labor; and it is not fair to say that, because Congress intended to include

but four, the State Legislature likewise intended to include but four.

It was clearly the intention of the New York legislature to *exclude* insurance clerks from the benefit of the statute, as shown in *In re Stryker*, *supra*, but the same construction cannot be placed on the Washington statute.

From the authorities heretofore cited, it is clear that the Washington statute intended to include not only manual laborers but "every person" who devotes all of his time and effort to a given business and who actually helps in the production of the goods manufactured; and the mere fact that appellee earned a little more than the foreman or the plainer or the engineer, should not exclude him from the classification of "every person performing labor"-especially when his work was more essential to the operation of the mill than was that of any of the other men aforementioned. salary had been fixed for general manager before he assumed those duties; he merely stepped into another man's place. His work consisted of soliciting orders, collecting money, selecting and buying timber and of general supervision of the mill and of the logging camp. If anyone performed labor, surely Davie did.

Referring to the first assignment of error, that the State statutes, under which appellee claims priority, have been supplanted by the provisions of the National Bankruptcy act, it is to be noted that this point has been raised for the *first time* in the Circuit Court of Appeals. Neither in the District Court nor before the Referee in Bankruptcy was this question considered; and appellee submits that this Court cannot now consider it.

Lane & Co., v. Maple Cotton Mills, 226 Fed. 692.

Pine River Logging & Imp. Co. v. U. S., 46L. Ed. 1164, 186 U. S. 279.

But in order to protect the interests of appellee, should this Court decide that the question raised is pertinent, a short discussion will be made on it.

The trend of statutes and decisions has been toward greater liberality in the matter of exemptions and priorities for labor claims. The language of the Bankruptcy Act is not that there shall be no such priorities allowed, except as provided in Section 64 B (4); on the contrary, it is positive in granting in all cases a certain priority. Congress may have thought that in some states labor lien laws did not include certain classes enumerated in Section 64 B (4); in fact, traveling salesman in some states can not obtain liens. In such cases Section 64 B (4) would control—the language being positive. But when, as here, the state law is more liberal than is the provision made in that section and when it includes all those classes and more, then it follows that the State law should apply and that

full effect should be given to all the language of the act.

In the cases of *In re Rouse*, *Hazard & Co.*, 91 Fed. 96, the question arose as to whether those classes enumerated in Section 64 B (4) should be governed by the provision therein, as to time and the amount earned, when the State statute was broader; and the court held that Section 64 B (4) alone would apply.

But the question of this section controlling when a labor-claimant, not included in its classification, wishes to obtain a priority under Section 64 B (5), has not been passed on, except in *In re Crown Point Brush Co.*, (D. C. N. Y.) 200 Fed. 882.

From the decision of this court in *In re Amoratis*, 178 Fed. 919, it would seem that appellee has a standing under the Bankruptcy Act.

It is respectfully submitted, therefore, that the order of the court below should be affirmed.

VAN M. DOWD, Attorney for Appellee.



United States

Circuit Court of Appeals

For the Ninth Circuit.

E. V. WINTERMOTE, Trustee of the Estate of BLUMAUER LUMBER COMPANY, a Corporation, Bankrupt,

Appellant,

VS.

T. H. MACLAFFERTY,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington,
Western Division.





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

RAYMOND J. McMILLAN, Esquire, Bank of California Building, Tacoma, Washington, and

ERNEST K. MURRAY, Esquire, Bank of California Building, Tacoma, Washington,

Attorneys for the Trustee, E. V. Wintermote, and Appellant.

VAN M. DOWD, Esquire, Fidelity Building, Tacoma, Washington,

Attorney for the Appellee W. T. MacLafferty. [1*]

[Title of Court and Cause.]

Stipulation as to Record on Appeal.

Whereas, in the above-entitled proceedings the trustee, E. V. Wintermote, did on the 20th day of December, 1915, duly file in the District Court of the United States for the Western District of Washington an assignment of errors, a petition for appeal and a citation, which said appeal was allowed by order of the District Court upon said day,

NOW, THEREFORE, it is hereby stipulated that the record to be certified to this court by the clerk of the United States District Court for the Western District of Washington on said appeal shall consist of the following:

- 1. This stipulation.
- 2. Proof of claim of T. H. MacLafferty.
- 3. Withdrawal of attorney.

^{*}Page-number appearing at foot of page of original certified Record.

- 4. Objections of trustee to claim of T. H. Mac-Lafferty.
- 5. Transcript of testimony taken at hearing before referee.
- 6. Order of referee allowing claim and overruling objections.
- 7. Petition for review, omitting exhibit "A," and order therefor.
- 8. Referee's certificate of review. [2]
- 9. Order affirming referee's order.
- 10. Assignment of errors.
- 11. Petition for appeal and order thereon.
- 12. Citation.

It is further stipulated and agreed that there may be omitted from the foregoing in each case the title of the court, the title of the cause and all verifications and indorsements.

Dated, Tacoma, Washington, December 20th, 1915.

RAYMOND J. McMILLAN, E. K. MURRAY,

Attorneys for Trustee-Appellant.

VAN M. DOWD,

Attorney for Claimant-Respondent.

(Filed Dec. 21, 1915.) [3]

Proof of Claim of T. H. MacLafferty.

At Tenino, in the county of Thurston, and District aforesaid, on the 1st day of October, 1915, came T. H. MacLafferty and made oath and says: That the bankrupt above named was at the time of the commencement of the proceedings in bankruptcy herein, and still is, justly and truly indebted to this deponent

in the sum of \$1,477.78. That the consideration of said debt is for salary earned for services rendered the above-named bankrupt as general manager, within six months prior to the commencement of the proceedings herein, and at the rate of \$300.00 per month, and for which deponent claims a lien and priority of payment under the laws and statutes of the State of Washington.

That no part of said debt has been paid; and there are no set-offs or counterclaims to the same, and this deponent has no security therefor other than the right of lien as aforesaid. No judgment has been recovered for said account and no note received therefor. This claim is an amendment to the claim filed herein on the 16th day of October, 1914, by this deponent, and is filed in the place and stead of said claim.

Deponent hereby appoints and constitutes E. K. Murray, of Tacoma, Washington, his attorney to act for him in all matters with reference to this claim.

T. H. MacLafferty.

Subscribed and sworn to before me this 1st day of October, 1915.

[Seal]

P. C. KIBBE,

Notary Public in and for the State of Washington, Residing at Tacoma.

(Filed Oct. 4, 1915.) [4]

[Title of Court and Cause.]

Notice [of Withdrawal of Attorney].

To the Honorable R. F. LAFFOON, Referee in Bankruptcy.

Please take notice that I hereby withdraw as attorney for T. H. MacLafferty, of Tenino, Washington, who has filed a claim in this proceeding for the sum of \$1,477.78, as a lien and priority claim.

E. K.MURRAY,
Attorney.

(Filed Dec. 14, 1915.) [5]

[Title of Court and Cause.]

Objections to Claim of T. H. MacLafferty.

Comes now E. V. Wintermote, the trustee herein, and objects to the claim of T. H. MacLafferty filed herein on the 2d day of October, 1915, for the sum of \$1,477.78, in so far as the same purports to be a lien claim against the property of the above-named bankrupt, and in so far as the same purports to be a claim entitled to priority of payment, for the reason that said claimant was the secretary and the general manager of the above-named bankrupt, and was a stockholder thereof, and for the reason that said claim does not state facts sufficient to constitute a lien against the property of the above-named bankrupt or to constitute a claim entitled to priority of payment, within the meaning of the bankruptcy act

or of the laws of the State of Washington.

E. V. WINTERMOTE,

Trustee.

RAYMOND J. McMILLAN, E. K. MURRAY, Attorneys for Trustee.

(Filed Dec. 17, 1915.) [6]

[Title of Court and Cause.]

Transcript of Testimony.

At Tacoma, Washington, in said District, on the 17th day of December, A. D. 1915.

Before Hon. R. F. LAFFOON, Referee in Bank-ruptcy.

Present: E. K. MURRAY, Atty. for Trustee.

VAN M. DOWD, Atty. for MacLafferty.

T. H. MacLAFFERTY, Witness. [7]

[Testimony of T. H. MacLafferty, for Claimant.]
Mr. T. H. MacLAFFERTY, being first duly sworn
on oath, testified as follows:

Direct Examination by Mr. MURRAY.

- Q. You are the claimant here? A. I am.
- Q. In what capacity were you employed by the bankrupt company prior to the bankruptcy?
- A. I was employed as superintendent of the operations at Tenino and manager of the mill there.
 - Q. In what business was the bankrupt engaged?
 - A. In the manufacture of lumber.
 - Q. Shingles? A. No.
 - Q. They had a wood-working plant?

- A. Yes, sir.
- Q. Of what did your duties as superintendent and manager consist?
- A. They consisted of the general operation of the plant, that is almost everything. We had no general foreman under me to handle the different operations and the more difficult parts I handled myself, such as keeping machinery in operation, inspecting machinery, etc. Any work that required a little better skill than the men I had hired as mechanics could do.
 - Q. You had charge of the office? A. Yes, sir.
 - Q. You had a bookkeeper and stenographer?
 - A. Yes.
 - Q. No other office help? A. No, sir.
 - Q. You had no mill foreman? A. No. [8]
 - Q. Was there not somebody over the men?
 - A. Not in the sawmill. We have a shipping clerk.
 - Q. Have you a yard foreman?
 - A. More of a shipping clerk than anything else.
 - Q. A woods foreman? A. Yes, sir.
- Q. Did you have any foreman in charge of the planing mill?
 - A. Just in charge of the machines.
- Q. You had general supervision of the entire operations? A. Yes, sir.
- Q. You had to do considerable physical labor in repairing machines that broke down did you not?
- A. Most of my time was occupied in that class of work.
 - Q. What salary did you receive as manager?

- A. Three hundred dollars a month.
- Q. Was that by a vote of the board of trustees?
- A. Well, yes.
- Q. Who fixed the salary of the other employees? You? A. Mostly.
 - Q. You employed the other men? A. Yes, sir.
 - Q. Were you the secretary of the company?
 - A. Yes, I suppose I was.
 - Q. One of the directors?
 - A. I was at one time.
 - Q. Did you own any stock?
- A. Up to within sixteen or eighteen months before the bankruptcy proceedings.
 - Q. What became of it?
- A. I turned it over to Mr. Blumauer. I was to receive a certain salary and ten per cent of the stock. That went on until the firm was incorporated. I just turned over the 10 per cent of [9] stock. He wanted to get a loan from the Seattle National Bank. To do it he had to have my stock. He turned it over to them. It was understood that I was not to go personally on any paper of the concern. When he wanted the stock, I turned it back to him. He agreed to raise my wages one hundred dollars a month. That is, from two hundred to three hundred.
- Q. That extra one hundred dollars was given in place of your ten per cent of stock?
 - A. Yes, sir.
- Q. There was no further meeting to elect a new secretary? A. No.
- Q. You continued in that office and signed the papers?

- A. As far as there was any necessity for it. Cross-examination by Mr. VAN M. DOWD.
- Q. Did you employ any traveling salesmen?
- A. No, I done that all myself.
- Q. Did your work take you in the mill every day?
- A. Every day except when I was out of town.
- Q. About what percentage of the days was actually required in the supervision of the mill?
- A. That would vary, sometimes I would probably work seventy-two hours straight. Whenever there was a breakdown, that was a most important part of my work, to take care of it.
- Q. Were any of the foremen's salaries fixed by Blumauer? A. I think not.

Redirect Examination by Mr. E. K. MURRAY.

- Q. What was the capacity of the mill?
- A. As high as ninety thousand feet a day.
- Q. It would not average that, would it?
- A. Yes. [10]

DOWD.—You don't mean it will average that?

A. Oh, no, that was the maximum. It would average from sixty to sixty-five thousand feet a day.

MURRAY.—You stated that you made a lot of repairs of machinery. Was it because you were the most handy man around there?

- A. I was employed because I was able to take care of things. A mill in the country has to have a master mechanic. That was why I was employed there.
- Q. You received your salary as general superintendent?
- A. I received a salary. I don't know what you would call it for.

- Q. You were employed as general manager and you did what you thought had to be done and you disposed of your own time?
- A. Well, to a very great extent, yes. I was general manager as far as the managing of the plant went.
- Q. Mr. Blumauer consulted you at all times, did he not? A. Yes.
- Q. There was nobody directing your movements around the mill, was there?
- A. Only Mr. Blumauer. If he saw anything he wanted changed, he would change it.

Recross-examination by VAN M. DOWD.

- Q. If you had been employed as an office man of the company, would it have been necessary to employ a master mechanic?
- A. Oh, yes, it would have been necessary. Most country plants do so. They also employ a mill foreman. I did that man's work myself, too.

Witness excused. [11]

[Title of Court and Cause.]

Order [of Referee] Overruling Objections of Trustee.

This matter having heretofore come on for hearing on the objections of E. V. Wintermote, the trustee herein, to the claim of T. H. MacLafferty, filed herein for the sum of \$1,477.78, in so far as said claim purports to be a lien claim or claim entitled to priority of payment, and the court having heard and fully considered the evidence introduced in behalf

of said trustee and said claimant, and having rendered its oral decision in open court,

Now, on motion of said claimant's attorney, it is ORDERED that the objections of said trustee to said claim, be, and the same are hereby in all respects overruled, and said claim allowed as a lien claim in this proceeding for the sum of \$1,477.78.

Dated Tacoma, Washington, December 17th, 1915.

R. F. LAFFOON,

Referee in Bankruptcy.

(Filed Dec. 17, 1915.) [12]

[Title of Court and Cause.]

Petition for Review and Order Therefor.

To the Honorable R. F. LAFFOON, Referee in Bankruptcy.

The petition of E. V. Wintermote, the trustee herein, respectfully represents:

That on the 17th day of December, 1915, an order, a copy of which is hereunto annexed, marked exhibit "A," and made a part hereof, was made and entered herein. That such order was and is erroneous in that it overrules the objections of your trustee to the claim of T. H. MacLafferty, filed herein for the sum of \$1,477.78, in so far as said claim purports to be a lien claim or claim entitled to priority of payment.

WHEREFORE your trustee feeling aggrieved because of such order prays that the same may be reviewed as provided in the Bankruptcy Law of 1898

and General Order XXVII.

E. V. WINTERMOTE,

Trustee.

(Verified.)

(Filed Dec. 17, 1915.)

The above review is hereby granted. December 17th, 1915.

R. F. LAFFOON,
Referee in Bankruptcy. [13]

[Title of Court and Cause.]

Referee's Certificate on Review.

To the Hon. EDWARD E. CUSHMAN, District Judge:

I, R. F. Laffoon, the referee in bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceding, an order, a copy of which is annexed to the petition hereinafter referred to, was made and entered on the 17th day of December, 1915.

That, on the 17th day of December, E. V. Wintermote, the trustee in such proceeding, feeling aggrieved thereat filed a petition for a review, which was granted.

That a summary of the evidence on which such order was based is as follows:

The claimant, T. H. MacLafferty, filed his amended proof of claim herein on the 4th day of October, 1915, claiming the sum of \$1,477.78 as due him for salary earned as general manager of the bank-rupt company within the six months next prior to the

bankruptcy herein at the rate of \$300 per month, and claims priority of payment therefor under section 1149 of Remington & Ballinger's Code of the State of Washington, and subsection B-5 of section 64 of the Bankruptcy Act of 1898; to which claim the trustee has filed exceptions and objections upon the ground that the claimant was the secretary and the general manager of the bankrupt, and was a stockholder thereof, and for the further reason that the claimant does [14] not state facts sufficient to constitute a lien against the property of the bankrupt, or to constitute a claim entitled to priority of payment within the meaning of the Bankruptcy Act or of the Laws of the State of Washington. Upon a hearing had before the referee on December 17, upon the examination of the claimant under oath, it appears that he was the general manager of the company and acted as such during the six months preceding the inception of the bankruptcy proceedings herein; that his salary was fixed at \$300 per month and that he is entitled to his claim of \$1,477.78 being a balance of his salary yet unpaid; that he was the secretary of the bankrupt company but not a stockholder during the time for which he claims priority of payment. It further appears from such examination that his services as general manager extended to, and included much detail work in overseeing and directing the operations of the mill, repairing and adjusting of machinery, and the employment of the labor and directing the sales. Upon the said hearing, the referee was of the opinion that the claimant was entitled to have his said claim allowed

and paid as a priority claim under the said section 1149 of Remington & Ballinger's Code of the State of Washington, and that it came within the rule of the Johnson Creek Lumber Company #1771, and the Chehalis River Lumber & Shingle Company #1655 of the files of this court, and as determined in said causes. Wherefore, the order herein complained of.

The question to be determined on this review is whether or not the claimant herein is entitled to priority of payment under said section 1149 Remington & Ballinger's Code, and Section 64, B-5 of the Bankruptcy Act of 1898.

I hand up for the information of the Judge, the following papers:

- 1. The record book of this proceeding.
- 2. The certificate herein.
- 3. The petition for review. [15]
- 4. The order complained of.
- 5. The proof of claim as filed.
- 6. The objections of said claim.
- 7. Transcript of testimony.
- 8. Withdrawal of attorney.
- 9. All other papers filed with me herein which are pertinent to this review.

Dated, this 17th day of December, A. D. 1915.

Respectfully submitted,

R. F. LAFFOON,

Referee in Bankruptcy. [16]

[Title of Court and Cause.]

Order Affirming Referee's Order.

This matter having heretofore come on for hearing on the petition of E. V. Wintermote, the trustee herein, for review of the order of the referee, dated December 17th, 1915, allowing the claim of T. H. MacLafferty, filed herein for the sum of \$1,477.78, as a lien claim, and overruling the objections of the trustee thereto, and the Court having heard and fully considered the arguments of counsel for said trustee and said claimant, and having rendered its oral decision in open court,

Now, on motion of said claimant's attorney, it is ORDERED that the order of the referee aforesaid, dated December 17th, 1915, allowing the claim of T. H. MacLafferty for the sum of \$1,477.78 as a lien claim, and overruling the objections of the trustee thereto, be, and the same is hereby affirmed, to which said trustee excepts and his exceptions are allowed.

Dated Tacoma, Washington, December 20th, 1915.

EDWARD E. CUSHMAN,

U. S. District Judge.

(Filed Dec. 21, 1915.) [17]

[Title of Court and Cause.]

Assignment of Errors.

Comes now E. V. Wintermote, trustee and appellant, and files the following assignment of errors.

First. That the United States District Court for the Western District of Washington erred in concluding that the statutes of the State of Washington providing for priority of payment to labor claimants in insolvency proceedings were not supplanted by the provisions of the Bankruptcy Act of 1898 dealing with the same subject.

Second. That the Court erred in concluding that the claimant, T. H. MacLafferty, who was the secretary, one of the directors and a stockholder of the bankrupt corporation, was entitled to a lien under and by virtue of the laws of the State of Washington, for his services rendered to said bankrupt as its general manager.

Third. That the Court erred in finding that the proof of claim filed by the claimant T. H. MacLafferty stated facts sufficient to entitle him to a lien or priority of payment.

Fourth. That the Court erred in making its order affirming the order of the referee allowing the claim of T. H. MacLafferty as a lien and priority claim and overruling the objections of the trustee thereto.

[18]

WHEREFORE the trustee prays that the order of the District Court of the United States for the Western District of Washington be reversed and that this cause be remanded for such further proceedings as are consistent with law and justice.

RAYMOND J. McMILLAN, E. K. MURRAY,

Attorneys for Trustee.

(Filed Dec. 21, 1915.) [19]

[Title of Court and Cause.]

Petition for Appeal to Circuit Court of Appeals and Order Therefor.

To the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court for the Western District of Washington:

E. V. Wintermote, the trustee in the above-entitled proceedings, conceiving himself aggrieved by the final order entered in this proceeding on the 20th day of December, 1915, affirming the order of the referee to whom this proceeding was referred allowing the claim of T. H. MacLafferty as a lien and priority claim for the sum of \$1,477.78 and overruling the objections of said trustee thereto, does hereby petition for an appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his appeal may be allowed and said order reversed and a citation granted directed to said T. H. MacLafferty, claimant, commanding him to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the records, proceedings and evidence in said proceeding, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

E. V. WINTERMOTE.

Trustee.

RAYMOND J. McMILLAN, E. K. MURRAY,

Attorneys for Trustee. [20]

[Order Allowing Appeal.]

The foregoing appeal is hereby allowed. Dated, December 21st, 1915.

EDWARD E. CUSHMAN, U. S. District Judge.

(Filed Dec. 21, 1915.) [21]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America, Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing and attached to be a true, full and correct transcript of the papers and proceedings in the case of Blumauer Lumber Company, a corporation, Bankrupt, No. 1663, lately pending in this court, as required by the stipulation of counsel filed in this cause, as the originals thereof appear on file in this court, at Tacoma, in the District aforesaid.

I further certify and attach thereto the original citation issued in this cause.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office, by and on behalf of the appellant herein, for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit:

Clerk's fees (Sec. 828 R. S. U. S.) for making
record, certificate and return, 31 folios @
$15\phi \dots \dots$
Clerk's certificate to transcript, 2 fo. @ 15¢30
Seal to said certificate
ATTEST my hand and the seal of the United
States District Court, at Tacoma, in this District,
this 20th day of December, A. D. 1915.
[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. —.

Citation on Appeal.

In the Matter of BLUMAUER LUMBER COM-PANY,

Bankrupt.

Deputy Clerk. [22]

United States of America,—ss.

The President of the United States to T. H. Mac-Lafferty, Greeting:

You are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, California, on the 21st day of January, 1916, pursuant to the appeal duly obtained and filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Southern Division, wherein you as claimant are ap-

pellee and E. V. Wintermote, trustee, is the appellant, to show cause, if any there be, why the final order in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf and to do and receive what may appertain to justice to be done in the premises.

WITNESS the Honorable EDWARD E. CUSH-MAN, United States Judge for the Western District of Washington, on the 21st day of December, 1915.

[Seal]

EDWARD E. CUSHMAN,

U. S. District Judge. [23]

Due service of within citation admitted this 21st day of December, 1915.

VAN M. DOWD,

Attorney for Claimant-Appellee.

[Endorsed]: No. 2718. United States Circuit Court of Appeals for the Ninth Circuit. E. V. Wintermote, Trustee of the Estate of Blumauer Lumber Company, a Corporation, Appellant, vs. T. H. MacLafferty, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Western Division.

Filed December 27, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk. [24]

United States Circuit Court of Appeals

For the Ninth Circuit

E. V. WINTERMOTE, Trustee of the Estate of Blumauer Lumber Company, a corporation, Bankrupt, Appellant,

No. 2718

VS.

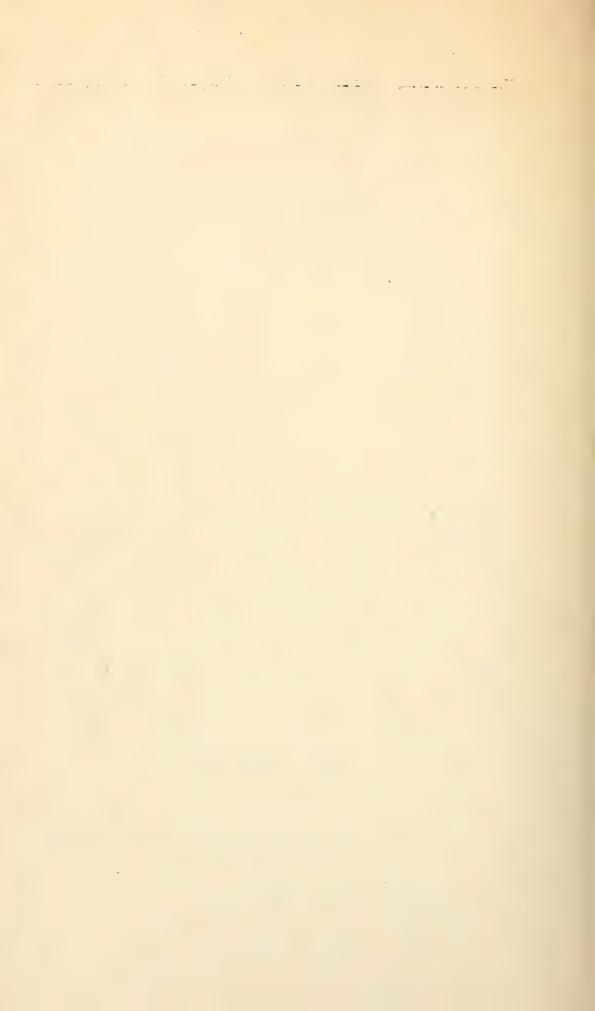
T. H. MACLAFFERTY,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT

RAYMOND J. McMILLAN, ERNEST K. MURRAY, Attorneys for Appellant.



United States Circuit Court of Appeals

For the Ninth Circuit

E. V. WINTERMOTE, Trustee of the Estate of Blumauer Lumber Company, a corporation, Bankrupt, Appellant,

No. 2718

VS.

T. H. MACLAFFERTY,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

The bankrupt was a corporation engaged in the manufacture and sale of lumber and in the operation of a wood turning factory. Its average daily output in lumber was approximately sixty-five thousand feet, and its capacity ninety thousand

Mr. T. H. MacLafferty, the claimant and appellant here, was the corporation's general manager, employed at a salary of three hundred dollars per month. He was one of its trustees and its secretary. Up to sixteen or eighteen months prior to bankruptcy he owned ten per cent. of the shares of capital stock. His duties as general manager consisted of general direction and supervision of the entire activities of the corporation. He oversaw the logging, sawmill and factory operations, made and directed sales, supervised the office work, and in the capacity somewhat of a master mechanic inspected and repaired the Company's machinery. The performance of this last duty, when necessary, involved the doing of some amount of physical labor. Mr. MacLafferty had under him a woods foreman in charge of the logging, a shipping clerk in charge the piling and shipping of lumber, and a factory foreman in charge of the wood turning machines. There was no mill foreman. In the office were a bookkeeper and a stenographer. Mr. MacLafferty hired and fixed the compensation of everyone employed by the corporation except himself. He was employed by the Board of Trustees, of whom he was one, and his salary fixed by them. (Record pp. 5-9.)

The corporation was adjudged a voluntary bankrupt on October 3, 1914. At that time there was owing to Mr. MacLafferty, as the balance of his salary, earned within the six months next prior thereto, the sum of \$1,477.78. For this amount he

filed a claim in this proceeding, asserting a lien and priority therefor, under and by virtue of the laws of the State of Washington. (Record pp. 2-3.) To this claim, in so far as it asserted a lien and priority, the trustee objected, for the reason that the claim did not state facts sufficiently to entitle the claimant thereto. (Record pp. 4-5.) It was the trustee's contention that the claimant was not one entitled to a lien and priority under the statutes of the State of Washington, giving a lien to persons performing labor in the operation of a corporation of the class of which the bankrupt was one, and further, that such statutes were supplanted by the provisions of the National Bankruptcy Act dealing with the same subject. The Referee, after a hearing, overruled these objections. (Record pp. 9-10.) A review of the order entered thereon was granted to the trustee and taken to the District Judge (Record pp. 10-13), who made the order, which is complained of on this appeal, affirming the Referee's order (Record p. 14). Thereupon this appeal was perfected. (Record pp. 14-20.)

ASSIGNMENTS OF ERROR.

The following assignments of error are relied upon:

First. That the United States District Court for the Western District of Washington erred in concluding that the statutes of the State of Washington providing for priority of payment to labor claimants in insolvency proceedings were not supplanted by the provisions of the Bankruptcy Act of 1898 dealing with the same subject. (Record pp. 14-15.)

Second. That the Court erred in concluding that the claimant, T. H. MacLafferty, who was the secretary, one of the directors and a stockholder of the bankrupt corporation, was entitled to a lien under and by virtue of the laws of the State of Washington, for his services rendered to said bankrupt as its general manager. (Record p. 15.)

Third. That the Court erred in finding that the proof of claim filed by the claimant, T. H. Mac-Lafferty, stated facts sufficient to entitle him to a lien or priority of payment. (Record p. 15.)

Fourth. That the Court erred in making its order affirming the order of the Referee allowing the claim of T. H. MacLafferty as a lien and priority claim and overruling the objections of the trustee thereto. (Record p. 15.)

ARGUMENT.

The third and fourth assignment of errors are general, and are necessarily included in the first and second assignments and will be considered therewith and not otherwise.

The questions involved on this appeal are almost identical, both as to law and facts, with those involved in the case of *Keyes*, *trustee*, *v*. *Davie*, number 2717, on appeal before this court at this term, and submitted herewith. The attorneys for appellant and appellee in both cases are the same, and we will therefore not enter into a lengthy repetition of the argument which is already before the court in the *Davie* case, but will confine ourselves to a statement of the general principles and a citation of the cases sustaining the same, together with a few remarks on the difference which does exist between this case and the *Davie* case.

We will first discuss the second assignment of error.

Appellee is not one entitled to a lien and priority under the provisions of the statutes of the State of Washington giving the same to persons performing labor in the operation of a corporation of the class of which the bankrupt was one.

Appellee was General Manager of the bankrupt, supervising and managing all its affairs. He was Secretary and one of the board of Trustees. The court below allowed priority to his claim for salary

under the provisions of Section 1149, Remington & Ballinger's Annotated Codes and Statutes of Washington (Laws 1897, Chapter 43, Section 1). That section reads:

"Every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, sawmill, lumber or timber company, shall save a prior lien on the franchise, earnings, and on all the real and personal property of said person, company or corporation, which is used in the operation of its business, to the extent of the moneys due him from such person, company or corporation, operating said franchise or business, for labor performed within six months next preceding the filing of his claim therefor, as hereinafter provided; and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien."

Section 1150 id. (Laws 1897, Chapter 43, Section 2), reads:

"No person shall be entitled to the lien given by the preceding section unless he shall, within ninety days after he has ceased to perform labor for such person, company or corporation, file for record with the county auditor of the county in which said labor was performed, or in which is located the principal office of such person, company or corporation in this state, a notice of claim, containing a statement of his demand, after deducting all just credits and offsets, the name of the persons, company or corporation, if known, with the statement of the terms and conditions of his contract, if any, and the time he commenced the employment, and the date of his latest service, and shall

serve a copy thereof on said person, company or corporation within thirty days after the same is so filed for record."

Section 1153, id. (Laws 1897, Chapter 43, Section 5), reads:

"Whenever a receiver or assignee is appointed for any person, company or corporation, the court shall require such receiver or assignee to pay all claims for which a lien could be filed under this chapter, before the payment of any other debts or claims other than operating expenses."

The purpose of these statutes, as stated uniformly in the cases construing similar enactments, is to protect persons in inferior and subordinate positions engaged in tasks of a manual, menial or clerical nature, for which the compensation is small, and to whom the modest amount of their wages is an object of necessity and importance, and who are poorly equipped and qualified to protect themselves and care for their own concerns.

Coffin v. Reynolds, 37 N. Y. 640.

In re Stryker (N. Y. Ct. of App.), 53 N. E. 525.

Oliver v. Macom Hardware Co., 98 Ga. 249, 58 Am. St. Rep. 300.

Pullis Bros. Iron Co. v. Boember, 91. Mo. App. 85.

Sound reason based upon public policy and welfare demands that the wages and earnings of such

persons be protected, but such reason does not apply to claims of the nature of that of the appellee here. The appellee was in control of the corporation's affairs and was fully cognizant of its financial condition, and was undoubtedly to some degree responsible therefor. With full knowledge of the company's condition he allowed his salary to accumulate to the sum of approximately \$1,500. It is only the wages of those who are dependent upon their earnings for their daily sustenance which the statute intends to protect. It does not apply to those who are in a position to let their earnings accumulate. As stated in Re Grubb, Wiley Grocery Co. (D. C. Mo.), 96 Fed. 183, it would be a strange state of affairs, indeed, if the persons in charge of a corporation could, after voting themselves salaries ad libitum, and, by their mismanagement, wrecking the concern, then be preferred in the amount of their salaries to the exclusion of the general creditors who sold property and extended credit upon their solicitation.

See, also, People v. Remington, 52 N. Y. 329.

The class which is preferred by the statutes above quoted is "persons performing labor." The basic word in this phrase is "labor." The meaning of this word in common parlance is, as defined in the dictionaries, services of a manual, menial or clerical nature. It is services rendered by persons whom public policy demands should be secured and protected in the amount of their scant earnings. One

who performs "labor" is most appropriately described as a "laborer." The statutes of many states describe the class entitled to priority by terms of broader significance than do the statutes in question here. In many the word "employes," of concededly broader meaning, is used. These cases uniformly hold that such persons as the appellee here are not included within the class entitled to priority.

In re Stryker (N. Y. Ct. of Ap.), 53 N. E. 525.

Michigan Trust Co. v. Grand Rapids Democrat, 113 Mich. 615, 71 N. W. 1102, 67 Am. St. Rep. 486.

Pennsylvania & Delaware R. R. Co. v. Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189.

In re Directors of American Lace & Fancy Paper Co., 51 N. Y. Sup. 818.

Lewis v. Fisher (Md.), 30 Atl. 608.

Casualty Insurance Co. case (Md.), 34 Atl. 778.

In re Carolina Cooperage Co. (D. C. N. C.), 96 Fed. 950.

In re Albert O. Brown (D. C. N. Y.), 171 Fed. 281.

In re Crown Point Brush Co. (D. C. N. Y.), 200 Fed. 882.

In re Continental Paint Co. (D. C. N. Y.), 220 Fed. 89.

This case differs from the *Davie* case submitted herewith only in the fact that the appellee here was

not an owner of the capital stock of the corporation during the period shortly prior to the initiation of the bankruptcy proceedings, and in that the appellee here on occasions, when necessity demanded, performed some physical labor in making repairs on machinery. Neither the amount nor the frequency nor the value of this physical labor appears, and it is conceded that appellee was employed and paid by the Board of Trustees for his services as General Manager. Undoubtedly, all general managers of companies carrying on business similar to that of the bankrupt here do some amount of physical labor. That, however, is not the primary purpose for which they are employed and paid.

In the case of *Blessing v. Blanchard* (C. C. A. 9th Cir.), 223 Fed. 35, the general maneger of an automobile concern employed at \$300.00 per month worked also in the capacity of a salesman. This court did not for that reason sustain his claim to priority.

In Re Greenberger (D. C. N. Y.), 203 Fed. 583, the claim before the court was that of a manager of a branch store of a bankrupt. It appeared that he swept the floors, kept books and sold goods. The court said in denying his claim to priority under Section 64b cl. 4 of the Bankruptcy Act of 1898:

"It would hardly do to hold that the general manager of the business of a corporation or individual, employed and paid as such, becomes entitled to priority for the reason that he incidentally sweeps the floor, dusts the counters, and assists in selling goods. Adopt this rule, and general managers of a business would be sure to do enough menial work to bring themselves within the section of the Bankruptcy Act giving priority to workmen, clerks, salesmen and servants."

The court below relied chiefly upon In re Lawler, 110 Fed. 135, decided by Hanford, J., of the District Court from which this appeal is urged. We believe that decision is erroneous, and since it was rendered by the same court from which this appeal is taken, we feel that we are in a sense appealing from that decision, too, and that our attitude toward it should be the same as toward the decision in the present case. The court in that case construes the word "employes," contained in the title of the act, rather than the word "labor," contained in the body thereof. The services of the salesman which were allowed priority in that case were of a manual and menial character and are easily distinguishable from those of the appellee in the present case.

Hanford, J., in the decision of the Lawler case, applies what he terms to be a liberal construction under the provisions of Section 1147, Remington & Ballinger's Annotated Codes and Statutes of Washington. That section reads:

"The provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed, with a view to effect their objects."

This liberal construction is directed only for the purpose of effecting the object of the act, which is in no way effected by including the claim of the appellee in this case. Liberal construction as called for by this provision does not mean liberal construction of the class of persons entitled to priority, but applies to the other phases of the enactment, as for instance, to the property to which the priority attaches.

Nunz v. Cumberland Gap Park Co. (Tenn.),52 S. W. 999, 76 Am. St. Rep. 650, 47 L. R.A. 273.

People v. Remington, 52 N. Y. 329.

The question presented on this appeal has never been before the Supreme Court of the State of Washington, and its decisions throw no light thereon. The case of Cors & Wagner v. Ballard Iron Works, 41 Wash. 390, 82 Pac. 713, is cited by the court below. A casual examination of that case will disclose that the question involved here was in no way considered there.

We have examined a large number of decisions interpreting statutes similar to those in question here, and believe that the meaning applied to the word "labor" by the court in this case and in the Davie case, is the broadest ever given it by any court.

We will now consider the first assignment of error.

The statutes of the State of Washington under which appellee claims a lien and priority is supplanted by the provisions of the National Bankruptcy Act dealing with the same subject.

Appellee in this case filed no lien under the provisions of Section 1150, supra. If he is entitled to priority it is by virtue of the provisions of Section 1153, supra. That section provides the rank of payment of the claims of "persons performing labor" in case of the appointment of a receiver, and directs that such payment be before all other claims, excepting operating expenses. The inchoate right of lien which existed by virtue of Section 1149, supra, is thus converted into a priority. The legislature undoubtedly deemed that the orderly administration of insolvent estates demanded that a multiplicity of suits by reason of foreclosure of liens be avoided, and therefore substituted for the unperfected lien right a right to priority. If this priority is introduced into the Bankruptcy Act it is by virtue of the provisions of Section 64b cl. 5 thereof. Section 64b provides:

"The debts to have proirity, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be * * * (4) wages due to workmen, clerks, travelling or city salesmen or servants, which have been earned within three months before the date of the commencement of the proceedings, not to exceed \$300. to each claimant; and (5) debts owing to any person who by the laws of the states or the United States is entitled to priority."

Section 64b cl. 4 is a specific enactment upon the question of the order and rank of payment of claims for labor. Can it be construed that the general language contained in Section 64b cl. 5 introduced into the act a different and conflicting provision with reference to the same subject? A well-known rule of statutory interpretation would indicate otherwise. See Suth. St. Const. Section 158.

In the following cases it has been held that Section 64b cl. 4 supplants Section 64b cl. 5 on the question of priority to labor claimants:

In re Rouse, Hazard Co. (C. C. A. 7th Cir.), 91 Fed. 96.

In re Lewis (D. C. Mass.), 99 Fed. 935.

In re Shaw (D. C. Pa.), 109 Fed. 782.

In re Slomka (C. C. A. 2nd Cir.), 122 Fed. 630.

In re Crown Point Brush Co. (D. C. N. Y.), 200 Fed. 882.

In re Crawford Woolen Co. (D. C. W. Va.), 218 Fed. 951.

See also Collier on Bankruptcy, 10th Ed., p. 912.

The Bankruptcy Act is entitled "An act to establish a uniform system of bankruptcy throughout the United States." Uniform as used in this title must mean uniform as between the several states. Congress undoubtedly had in mind in the enactment of this provision the various provisions of statutes

in the several states with reference to this subject. It found them not in harmony either as to the persons entitled to priority, the amount for which priority was given, or the limitation of time over which it extended. With this divergence in its knowledge, congress spoke on the subject specifically and particularly and limited the amount, the time and fixed the class of persons entitled thereunder. It is not to be presumed that congress in the general provision immediately following intended to derogate from this express enactment. It must be presumed to have intended what it stated with particularity, and not what might be inferred from the use of the general terms.

It is respectfully submitted that the order of the court below allowing the appellee a lien and priority should be reversed.

RAYMOND J. McMillan, Ernest K. Murray, Attorneys for Appellant.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. V. WINTERMOTE, Trustee of the Estate of Blumauer Lumber Company, a corporation, Bankrupt, Appellant.

VS.

T. H. MACLAFFERTY, Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF OF APPELLEE

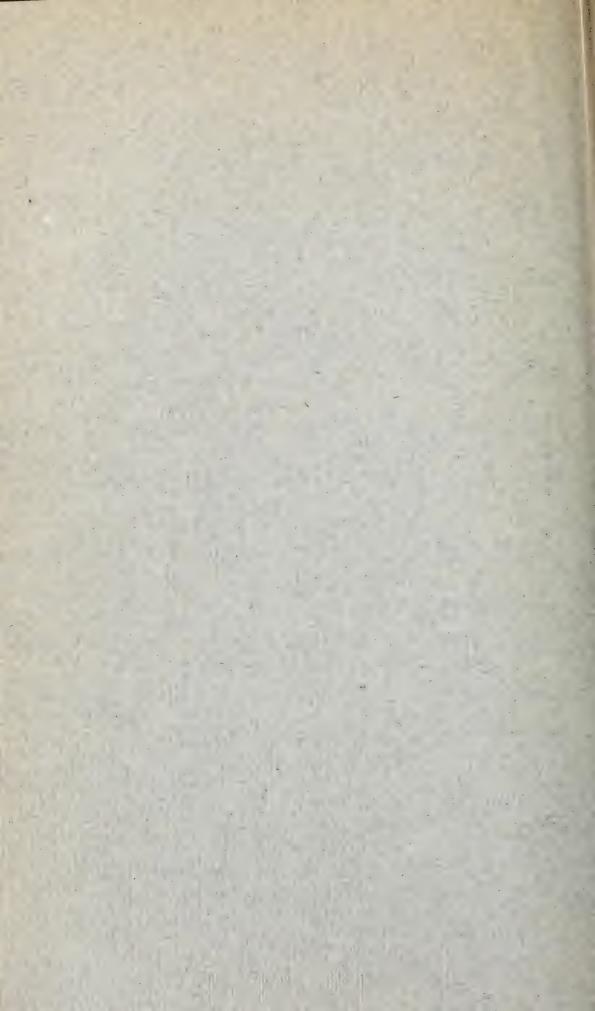
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VAN M. DOWD,

Attorney for Appellee.

1003 Fidelity Building, Tacoma, Wash.



No. 2718

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. V. WINTERMOTE, Trustee of the Estate of Blumauer Lumber Company, a corporation, Bankrupt, Appellant.

VS.

T. H. MACLAFFERTY, Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF OF APPELLEE

ARGUMENT.

The facts in the above case differ somewhat from those in the case of *Keyes*, *Trustee v. Davie*, number 2717, but the questions of law are practically the same and the same arguments will be submitted,

except where additional authorities are cited in support of the change in facts.

The question involved in the second assignment of error will be discussed first, in order to make an easier comparison with appellant's brief.

Appellee herein was the general manager of the company, but owned no stock in the company, being nominally secretary because a change was never made after he gave up his stock. This case is, therefore, parallel with *In re Swain*, 194 Fed. 749, so far as the objection of being a stockholder and an officer of the company is concerned.

Appellee was virtually mill foremen and did some physical labor, working—when the emergency arose—as long as seventy-two hours straight. In fact, he was a master mechanic, and by virtue of these different kinds of work is entitled to a labor lien under the Washington lien statutes.

Graham v. Gardner, 45 Wash. 648.

In re Lawler, 110 Fed. 135.

Cors & Wegener v. Ballard Iron Works, 41 Wash. 380, 82 Pac. 713.

Gould v. McCormick, 75 Wash. 61.

Vincent v. Snoqualmie Mill Co., 7 Wash. 566.

A master mechanic is entitled to a labor lien.

Sleeper v. Goodwin, 67 Wis. 590.

A manager of a mill and a foreman of a mill are entitled to liens for their labor.

Conlee Lbr. Co. v. Ripon Lbr. & Mfg. Co., 29 N. W. 285.

Willamette F. & T. M. Co., v. Remick, 1 Or. 169.

Wetzel & T. Ry. Co. v. Tennis Bros Co., 145 Fed. 458.

A superintendent is entitled to a lien.

Pendergast v. Yandes, 8 L. R. A. 849. Stryker v. Cassidy, 76 N. Y. 50.

In the case of Flagstaff Silver Mining Co. of Utah v. Cullins, 104 U. S. 176, 26 L. Ed. 704, the United States Supreme Court was called on to construe and interpret the lien statute of Utah, which reads as follows: "Any person or persons who shall perform any work or labor upon any mine, or furnish material," etc. The court said, in describing the duties of Cullins:

"He was the overseer and foreman of the body of miners who performed the manual labor upon the mine. He planned and personally superintended and directed the work with a view to develop the mine and make it a successful venture. * * Their performance (duties) may well be called work and labor; they require the personal attention and supervision of the foreman and occasionally in an emergency it becomes necessary for him to

assist with his own hands. Such duties cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under the control of the foreman, is nevertheless as really work and labor. Bodily toil as well as some skill and knowledge in directing the work is required for their successful performance."

Cullins had full authority to employ and discharge and procure miners and purchase supplies for working the mine. It was his duty to oversee and direct the work in the mine, to direct the shipping of ore, and generally to control the working and development of the mine.

How could two cases be more perfectly parallel? The statutes are similar, and the duties are so nearly alike that if the name MacLafferty were substituted for Cullins and Mill for Mine, one would think he was reading a description of the duties of appellee in this case.

The court, in answer to the claim that he was not a laborer, said: "Statutes, giving liens to laborers and mechanics for their work and labor, are to be liberally construed."

In the case of *Blessing vs. Blanchard*, (C. C. A. 9th Cir.) 223 Fed. 35, a superintendent and foreman of the repair department was held entitled to a labor lien, even under the National Bankruptcy

Act. MacLafferty was superintendent and foreman of the mill, besides being master mechanic.

From the cases above cited, indubitably it would seem that MacLafferty was performing labor in the operation of the mill, and that his services as master mechanic would certainly place him in the classification of the Washington statutes, even if literally and strictly construed.

Appellant cannot raise the question of the National Bankruptcy Act supplanting the State Statutes because that question was not considered in the District Court or before the Referee.

Lane & Co. vs. Maple Cottage Mills, 226 Fed. 692.

Pine River Logging & Impr. Co. vs. U. A., 46 L. Ed. 1164, 186 U. S. 279.

The rules of equity govern questions of appeal and the above two cases hold that appellant is estopped from raising a question in the higher court that was not raised in the court below. This is a rule both in the Federal and in the State courts.

The cases cited in appellant's brief, with the exception of one, do not decide the question of section 64 B (4) governing labor claims where claimant is not within the classification of that section; rather, they decide the question that this section governs

and takes precedence over state statutes relative to time and amounts claimed by persons coming within the provisions of Section 64 B (4).

Under *In re Amoratis*, 178 Fed. 919, appellee's claim should be allowed.

It is respectfully submitted that the order of the court below should be affirmed.

VAN M. DOWD, Attorney for Appellee.

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

JOSEPH E. WISE and LUCIA J. WISE,

Appellants,

VS.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr., JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN,

and

Appellees,

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr.,

Appellants,

JOSEPH E. WISE and MARGARET W. WISE,

Appellees,

JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN,

Appellants,

VS.

JOSEPH E. WISE and MARGARET W. WISE,

Appellees,

and

SANTA CRUZ DEVELOPMENT COMPANY, a Corporation,

Appellant,

VS.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, Jr., JOSEPH E. WISE, MARGARET W. WISE, JENNIE N. BOULDIN, DAVID W. BOULDIN, and HELEN LEE BOULDIN,

Appellees.

VOLUME I. (Pages 1 to 320, Inclusive.)

Upon Appeals from the United States District Court for the District of Arizona.



United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

JOSEPH E. WISE and LUCIA J. WISE,

Appellants,

VS.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr., JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN,

Appellees,

and

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr.,

Appellants,

VS.

JOSEPH E. WISE and MARGARET W. WISE,

Appellees,

and

JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and
HELEN LEE BOULDIN,

Appellants,

VS.

JOSEPH E. WISE and MARGARET W. WISE,

Appellees,

and

SANTA CRUZ DEVELOPMENT COMPANY, a Corporation,

Appellant,

VS.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, Jr., JOSEPH E. WISE, MARGARET W. WISE, JENNIE N. BOULDIN, DAVID W. BOULDIN, and HELEN LEE BOULDIN,

Appellees.

VOLUME I. (Pages 1 to 320, Inclusive.)

Upon Appeals from the United States District Court for the District of Arizona.



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^{*}Page-number appearing at foot of page of original certified Record.

In the District Court of the United States in and for the District of Arizona.

E-5—TUCSON.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr.,

Plaintiffs,

VS.

SANTA CRUZ DEVELOPMENT COMPANY,
JAMES E. BOULDIN, JENNIE N.
BOULDIN, JOSEPH E. WISE, LUCIA J.
WISE, MARGARET W. WISE JESSE H.
WISE, DAVID W. BOULDIN, HELEN
LEE BOULDIN, M. I. CARPENTER,
PATRICK C. IRELAND, IRELAND
GRAVES, ANNA R. WILCOX, ELDREDGE I. HURT and W. G. RIFENBURG,
Defendants.

United States of America, State of Arizona,—ss.

Be it remembered, that in the District Court of the United States for the District of Arizona, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Action commenced by filing of bill June 23, 1914. In amended pleadings paragraph numbers of originals are preserved.

Plaintiff's Amended Bill of Complaint.

Filed March 26, 1915.

To the Honorable, the Judge of the District Court of the United States in and for the District of Arizona:

Cornelius C. Watts, a citizen of the State of West Virginia, residing at Charleston in that State, and Dabney C. T. Davis, Jr., a citizen of the State of West Virginia, residing at Lewisburg in that State, bring this, their blll, against Santa Cruz Development Company, a corporation organized and existing under the laws of the [1a] State of Arizona; Jennie N. Bouldin, and James E. Bouldin, her husband, citizens of the State of Missouri, residing at Kansas City in that State; Margaret W. Wise and Jesse H. Wise, her husband, citizens of the State of Pennsylvania, residing at Waynesburg in that State; and John Bouldin and Mary Bouldin, citizens of the State of Texas, residing at Austin in that State; W. G. Rifenburg, a citizen of the State of California, residing at San Diego, California, and Joseph E. Wise and Lucia J. Wise, his wife, citizens of the State of Arizona, and residing at Calabasas, in that State.

And thereupon your orators complain and say:

1. By the sixth section of an act entitled "An Act to Confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860, the Congress of the United States provided:

"That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number; and it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them; provided, however, that the right hereby granted shall continue in force for three years from the passage of this act, and no longer."

2. On June 17, 1863, pursuant to the provisions of the said act of June 17, 1860, the heirs of Luis Maria Baca by John S. Watts as their attorney selected and located by a description with reference to natural objects and by courses and distances as required by the regulations of the General Land Office a tract or parcel of land as follows:

"Commencing at a point one mile and a half from the [2] base of the Salero Mountain in a direction North forty-five degrees East of the highest point of said mountain, running thence from said beginning point West twelve miles, thirty-six chains and forty-four links; thence South twelve miles, thirty-six chains and forty-four links; thence East twelve miles, thirty-six chains and forty-four links; and thence North twelve miles, thirty-six chains and forty-four links to the place of beginning."

the said tract or parcel of land being known and

designated as Baca Float No. 3, and being then situated in that portion of New Mexico included by Act of Congress approved February 24, 1863, in the Territory of Arizona and which tract of land is now in the county of Santa Cruz, in the State of Arizona.

- 3. Thereafter the Surveyor General of New Mexico duly approved said selection and location and forwarded the same with his approval thereof to the General Land Office at Washington, D. C., for the action thereon of the Commissioner of the General Land Office; and after due consideration and examination the said Commissioner on April 9, 1864, approved said selection and location and ordered it to be surveyed.
- 4. No survey was made until the year 1905, in which year the said land was duly surveyed by one Contzen under a contract with the Surveyor General of Arizona, and the plat and field notes of such survey, with the certificate of said Surveyor General approving the same as complying with the requirements of the land office, were, on or about November 23, 1906, forwarded to the General Land Office at Washington, D. C., where they were examined and approved.
- 5. On or about May 1, 1864, the heirs of Luis Maria Baca sold and conveyed Baca Float No. 3, as hereinbefore particularly described, to John S. Watts by deed duly executed and acknowledged and recorded in the office of the [3] clerk of the Probate Court for Santa Fe County, New Mexico, May 14, 1864, in book C, pages 551 to 555; in the office of the clerk of the Probate Court for San Miguel

County, New Mexico, August 24, 1866, in book 3, pages 51 to 58; in the office of the county recorder of Pima County, Arizona, May 25, 1894, in book 26 of Deeds of Real Estate at page 547 et seq., and June 13, 1894, in the same book at page 364 et seq., whence it was transcribed into the records of the county recorder of Santa Cruz County, Arizona, in book 2 of Deeds of Real Estate (Transcribed) at page 142, et sequitur.

- "6. On or about January 8, 1870, the said John S. Watts sold and conveyed said Baca Float No. 3 to Christopher E. Hawley by deed duly executed and acknowledged and recorded May 9, 1885, in the office of the county recorder of Pima County, Arizona, in book 13 of Deeds of Real Estate at page 66, et sequitur, whence it was transcribed into the records of the county recorder's office of Santa Cruz County, Arizona, in book 1, of Deeds of Real Estate (Transcribed) at page 582 and a copy of which deed marked exhibit "A" is hereto attached and by reference made a part hereof."
- 7. On or about April 30, 1866, the said John S. Watts had applied to the Commissioner of the General Land Office for leave to amend the description by metes and bounds of said Baca Float No. 3, so that the same should read as follows:

Commencing at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north 12 miles 36 chains and 44 links, thence east 12 miles 36 chains and 44 links, thence south 12 miles 36 chains and 44 links,

thence west 12 miles 36 chains and 44 links to the place of beginning. [4]

under the belief that the said change was simply an amendment of the selection and location as made June 17, 1863, and could be made notwithstanding that the three years within which the selection and location was required by the act of June 21, 1860, to be made had expired and the Commissioner of the General Land Office acting under the same belief attempted to permit the change to be made. From May 21, 1866, when the Commissioner of the General Land Office made the order by which he purported to allow the attempted amendment of the description by metes and bounds of Baca Float No. 3, until July 25, 1899, when the Secretary of the Interior finally decided that the Commissioner of the General Land Office was without authority to permit such attempted amendment of the description by metes and bounds of Baca Float No. 3, and that the grant claimants must abide by the description by metes and bounds given in the selection and location of June 17, 1863, all parties interested, including the land office, believed that Baca Float No. 3 was described by the metes and bounds of the so-called amended location of 1866. Prior to July 25, 1899, no survey of the Float had been made by the Government and consesquently no actual metes and bounds of said Float had been located on the ground to determine the actual boundaries of said Float.

8. The said John S. Watts intended to and did convey to Christopher E. Hawley by the deed of

January 8, 1870, exhibit "A," Baca Float No. 3, as the same is described in paragraph 2 hereof as appears by the express terms of said deed, that is, that the said John S. Watts "has remised, released and quitclaimed, and by these presents do remise, release and quitclaim" unto the said Christopher E. Haw-"all that certain tract, piece or parcel of land, situate, lying and being in the Santa Rita Mountains in the Territory of Arizona, U.S. A., containing one hundred thousand acres, be the same more or less, granted to the said heirs of Luis Maria Cabeza de Baca by the United States and by the heirs conveyed to the party of the first part" (said John S. Watts) "by deed dated on the 1st day of May, 1864. The said tract of land being known as location No. 3, of the Baca Series" and the description by metes and bounds which have been omitted and stars substituted in its place was used under the mistaken belief existing at the time said deed was made as to the metes and bounds of the Float.

9. * * * On or about March 2, 1863, the said John S. Watts executed and delivered to one William Wrightson, a title bond for said Baca Float No. 3, and prior to January 8, 1870, the said Christopher E. Hawley had become entitled to and was in possession of said title bond and entitled thereunder to have a fee simple title to Baca Float No. 3 as described in paragraph 2 hereof, made to him and the plaintiffs, as successors in title to said Hawley, now own and possess said title bond.

(Paragraph 10 omitted.)

11. On or about May 30, 1871, the heirs of Luis

Maria Baca executed a deed to the said John S. Watts, which was duly recorded in Santa Ana County, New Mexico, and wherein and whereby the said heirs ratified and confirmed the title made by them and by their "attorney Tomas Cabeza de Baca to John S. Watts, his heirs and assigns on the 1st day of May, 1864," for the lands described [6] in location number three situate in Arizona Territory, containing 99,289.39 acres, the boundaries of which are set forth and described in said deed, and wherein and whereby the "said heirs of the said Luis Maria Baca, dec'd * * * relinquish and quitclaim to said John S. Watts, his heirs and assigns all their right, title and interest in all the lands in said deed of May 1st, 1864, mentioned and described." This deed inured to the benefit of the said Christopher E. Hawley and cured any defect that might have existed from the manner in which the deed to John S. Watts of May 1st, 1864, was executed on behalf of some of the heirs of Luis Maria Baca. The persons executing the deeds of May, 1864, and May 30, 1871, were all the heirs of Luis Maria Baca.

12. On or about January 14, 1878, certain persons claiming to be heirs of Luis Maria Baca executed to David W. Bouldin two instruments purporting to be quitclaim deeds in the same words and figures, which were recorded March 25, 1885, in Pima County, Arizona, in book 13 of Deeds of Real Estate at pages 1 and 6, and in Santa Cruz County, Arizona, in book 1 of Deeds of Real Estate (Transcribed) at pages 531 and 536, purporting to convey a two-thirds interest in Baca Float No. 3 as described in paragraph 2

hereof, a copy of one of which instruments is hereto attached, marked exhibit "B" and by reference made a part hereof; and on or about September 30, 1884, certain persons claiming to be the heirs of John S. Watts executed to David W. Bouldin an instrument purporting to be a quitclaim deed recorded without acknowledgment March 25, 1885, in Pima County, Arizona, in book 13 of Deeds of Real Estate at page 13 and re-recorded with acknowledgment April 18, 1888, in book 14, Real Estate and Mortgages, page 597, and in Santa Cruz County, Arizona, in book 1 of Deeds of Real Estate (Transcribed) at page 542, which purported to convey a two-thirds interest in Baca Float No. 3, as described in paragraph 2 hereof, a copy of which last-mentioned instrument is hereto attached, marked exhibit "C" and by reference made a part hereof. By the title bond hereinbefore referred to, all of the heirs of Luis Maria Baca and of John S. Watts held the title, if any remained in them in view of the deeds of May 1, 1864, and May 30, 1871, and of January 8, 1870, hereinbefore referred to, in trust for the said Christopher E. Hawley and his successors in title including the plaintiffs. The said David W. Bouldin never perfected the title to Baca Float No. 3, as described in paragraph 2 hereof in the heirs of Luis Maria Baca or in any manner or to any extent performed the said agreements on his part.

13. Prior to June 8, 1885, John C. Robinson had become the owner of the land conveyed by John S. Watts to Christopher E. Hawley, by deed of January 8, 1870, referred to in paragraph 6 hereof, and

on or about June 8, 1885, the said Robinson entered into an agreement with the said David W. Bouldin wherein and whereby the said Bouldin undertook to carry out the order of the Commissioner of the General Land Office, dated March 12, 1885, by which the said Commissioner undertook to authorize the said Robinson to relocate the said Baca Float No. 3, and wherein and whereby the said Robinson agreed that the said David W. Bouldin should have a half interest in the land so relocated. On or about June 15, 1887, the Secretary of the Interior finally decided that the said order of the Commissioner [8] of the General Land Office of March 12, 1885, was without authority and therefore void. The said agreement between the said Robinson and the said David W. Bouldin was, in its inception and at all times, impossible of performance by the said David W. Bouldin and void, and the said David W. Bouldin never could carry out said agreement on his part and never performed any part thereof, and the said David W. Bouldin never became entitled to a half or any interest under the said agreement in any land whatever.

14. On or about October 6, 1887, the said David W. Bouldin executed an instrument in the form of a mortgage which was recorded in Pima County, Arizona, October 12, 1887, in 7 of Mortgages, at page 475, and in Santa Cruz County, Arizona, in book 1 of Mortgages (Transcribed) at 409, wherein and whereby the said David W. Bouldin undertook and purported to convey to the defendant W. G. Rifenburg 12,500 acres in the northwest quarter of Baca

Float No. 3 according to the survey of said Float by George J. Roskruge, county surveyor of Pima County, Arizona, in September, 1887, which survey is understood to have followed the metes and bounds of the attempted amended location referred to in paragraph 7 hereof, to secure a promissory note for \$5,000, payable in twelve months thereafter with one per cent per month interest and five per cent attorney's fee. At the time he attempted to make such mortgage the said David W. Bouldin had no other or better title than was conveyed to him by the instruments particularly described in paragraph 12 and 13 hereof.

- 15. On or about October 16, 1888, the said David W. Bouldin and his wife executed an instrument in the form of [9] a deed which was recorded May 20, 1889, in Pima County, Arizona, in book 21 of Deeds of Real Estate, at page 134, and in Santa Cruz County, Arizona, in book 1 of Deeds of Real Estate (Transcribed), at page 327, wherein and whereby the grantors undertook and purported to convey to their sons, David W. Bouldin, Jr., and Powhatan W. Bouldin, an undivided half interest in the tract or parcel of land situate in Pima County, Arizona, described by the metes and bounds of the attempted amended location, referred to in paragraph 7 hereof. At the time he attempted to make such deed, the said David W. Bouldin had no other or better title than was conveyed to him by the instruments particularly described in paragraphs 12 and 13 hereof.
- 16. On or about June 28, 1892, the said John E. C. Robinson executed an agreement which was re-

corded August 23, 1892, in Pima County, Arizona, in book 23 of Deeds of Real Estate, at page 568, and in Santa Cruz County Arizona, in book 2 of Deeds of Real Estate (Transcribed), at page 461, and wherein and whereby it is recited:

"Whereas on the eighth day of June, 1885, John C. Robinson by his attorney in fact James Eldridge and David W. Bouldin for himself entered into an agreement for their equal and undivided ownership title and interest of all that tract or parcel of land known as Baca Float No. 3 situated in Pima County, Arizona Territory, and whereas we now desire to avoid all possible questions of difference that might arise in connection therewith, and for the full and perfect agreement, concerning said interest, and whereas the said David W. Bouldin has conveyed by deed the undivided half interest in and to said tract or parcel of land to his sons Powhatan W. Bouldin and James E. Bouldin,"

—and wherein and whereby the said John C. Robinson and the said Powhatan W. Bouldin and James E. Bouldin by the said David W. Bouldin as their attorney in fact undertook and purported "for the carrying out of said agreement of [10] June eighth 1885" to divide Baca Float No. 3 between the parties to said deed, one-half to the said John C. Robinson and one-half to the said Powhatan W. Bouldin and James E. Bouldin, and described the land by metes and bounds of the attempted amended location, referred to in paragraph 7 hereof, and said

instrument provided that the mortgage described in paragraph 14 hereof should not in any wise attach to the interest of the said Robinson in said property directly or indirectly, but that whatever legal responsibility attaches to said mortgage was thereby assumed by the said Powhatan W. Bouldin and James E. Bouldin. The agreement referred to in this paragraph was, on its face and by its express terms, made on the sole consideration of the agreement of June 8, 1885, described in paragraph 13 hereof, which said agreement was impossible to be performed by the said David W. Bouldin, as hereinbefore set forth, and said agreement was made under a mutual mistake of fact, without consideration and therefore void.

17. Allege upon information and belief that David W. Bouldin, Jr., died intestate on or about May 21, 1889, and thereafter and on or about August 23, 1892, the said David W. Bouldin executed an instrument in the form of a deed which was recorded August 24, 1892, in Pima County, Arizona, in book 23 of Deeds of Real Estate, at page 592, and in Santa Cruz County, Arizona, in book 2 of Deeds of Real Estate (Transcribed) at page 465, wherein and whereby the said David W. Bouldin undertook and purported to convey to his sons Powhatan W. Bouldin and James E. Bouldin, all his right, title and interest in and to Baca Float No. 3, describing it by the metes and bounds of the attempted amended location described in paragraph 7 hereof. At the time he made the [11] deed mentioned in this paragraph the said David W. Bouldin had no other or better title to the land sought to be conveyed than was conveyed to him by the instruments described in paragraphs 12, 13 and 16 hereof.

18. On or about November 19, 1892, the said John C. Robinson executed an instrument in the form of a deed which was recorded December 27, 1892, in Pima County, Arizona, in book 23 of Deeds of Real Estate, at page 675, and which recited the instrument of June 28, 1892, described in paragraph 16 hereof, and wherein and whereby said John C. Robinson undertook and purported to convey to the said Powhatan W. Bouldin and James E. Bouldin one-half of Baca Float No. 3 by the following description:

"Beginning at a point three (3) miles west by south from the building known as the Hacienda de Santa Rita running thence north six miles, eighteen chains and twenty-two links; running thence east twelve miles, thirty-six chains and forty-four links; running thence south six miles, eighteen chains and twenty-two links; running thence west twelve miles, thirty-six chains and forty-four links to the place of beginning. The said tract of land bounded and described in the sentence immediately foregoing this being the northern half of the tract known as Location number three (3) of the Baca series."

The instrument referred to in this paragraph was, by its express terms, made solely in order that each of the parties to the instrument of June 28, 1892, referred to in paragraph 16 hereof, might hold a half

of the land sought to be conveyed in severalty and falls with said instrument of June 28, 1892; * * * On or about November 12, 1892, David W. Bouldin as attorney in fact for Powhatan W. Bouldin and Lucy Bouldin, his wife, and James E. Bouldin, quitclaimed to John C. Robinson the south half of the foregoing tract of land. [12]

- 19. Whatever interest the said Powhatan W. Bouldin and James E. Bouldin took by reason of the foregoing instruments is now vested one-half in the defendant, Jennie N. Bouldin, and one-half in the defendants, John Bouldin and Mary Bouldin, who are infants under the age of twenty-one years.
- 20. On or about February 7, 1894, the said John C. Robinson gave a power of attorney to S. A. M. Syme to do whatever was necessary to avoid the deed to the said Powhatan W. Bouldin and James E. Bouldin, referred to in paragraph 16 hereof, and wherein and whereby the said Robinson recited that the consideration for the said deed was certain acts to be done and certain promises to be performed by the said Bouldins; that none of the said acts had been done nor any of the promises kept or performed by the said Bouldins; that the entire consideration for the said deed had wholly failed; that the said deed had thereby become void and of no effect or at least, voidable at his election and that he had elected to repudiate the said deed.
- 21. On or about February 21, 1885, the said David W. Bouldin executed an instrument in the form of a deed which was recorded June 19, 1885, in Pima County, Arizona, in book 13 of Deeds of

Real Estate, at page 140, and in Santa Cruz County, Arizona, in book 1 of Deeds of Real Estate (Transcribed) at page 570, and wherein and whereby the said David W. Bouldin undertook and purported to convey to John Ireland and Wilbur H. King the undivided one-third of one-third of all right, title and interest owned, controlled and possessed by the said David W. Bouldin in the land described in paragraph 2 hereof, and at that time the said David W. Bouldin, as has hereinbefore been shown, had no [13] right, title or interest in or to any part of the said land. Prior to May 2, 1895, as plaintiffs are informed and believe, the said David W. Bouldin and John Ireland and Wilbur H. King agreed to rescind the transaction in which the said deed was given, and the said David W. Bouldin gave the said John Ireland and Wilbur H. King his note for the money which had been paid him by the said Ireland and King, and said Ireland and King gave said Bouldin a bond to reconvey said land to him. The note was not paid when due and on May 2, 1895, a judgment on said note in favor of the said Ireland and King, and against Leo Goldschmidt, as administrator of the estate of the said David W. Bouldin, deceased, was rendered by the District Court for the First Judicial District of the Territory of Arizona; and under an execution issued on said judgment, the sheriff of Pima County, Arizona, sold and conveyed to the said Wilbur H. King, all the right, title and interest of Leo Goldschmidt, as such administrator, in and to the land described in paragraph 2 hereof on July 31, 1895, which was nothing. On or about

April 8, 1907, the widow of John Ireland executed a quitclaim deed, which was recorded May 2, 1907, in Santa Cruz County, Arizona, in book 4 of Deeds of Real Estate at page 360, and wherein and whereby she purported to convey to the defendant, Joseph E. Wise, all the right, title and interest she had in and to the land described in paragraph 2 hereof. On or about April 24, 1907, the said Wilbur H. King executed a quitclaim deed, which was recorded May 2, 1907, in Santa Cruz County, Arizona, in book 4 of Deeds of Real Estate, at page 357, and wherein and whereby the said King purported to convey to the defendant Joseph E. Wise, all his right, title and interest in the land described in paragraph [14] 2 hereof. * * *

- Between March 13, 1907, and September 17, 1913, various persons claiming to be descendants of Luis Maria Baca executed deeds purporting to convey to the defendant, Joseph E. Wise and his brother, Jesse H. Wise, all their right, title and interest as heirs of Luis Maria Baca in and to the land described in paragraph 2 hereof. The said Jesse H. Wise subsequently conveyed whatever interest in said land he acquired by said instruments to the defendant Margaret W. Wise. By reason of the title bond referred to in paragraph 9 hereof, and the deeds of May 1, 1864, and May 30, 1871, referred to in paragraphs 5 and 11 hereof, the persons executing the said deeds as descendants of Luis Maria Baca had no title to convey and the said Wises took nothing by said deeds.
 - 23. On or about October 26, 1899, J. Howe

Watts, Mary A. Wardwell, Louise Wardwell, Frances A. Bancroft and Albert L. Bancroft, her husband, who, with the exception of Albert L. Bancroft, are claimed to be the children of John S. Watts, executed what purports to be a guitclaim deed which was recorded August 2, 1909, in Santa Cruz County, Arizona, in book 5 of Deeds of Real Estate, at page 376, and wherein and whereby the grantors undertook and purported to convey to John Watts, who is claimed to be a son of John S. Watts, all the right, title and interest of the grantors as alleged heirs of John S. Watts in and to the land described in paragraph 2 hereof. The defendant Santa Cruz Development Company claims to have succeeded by subsequent conveyances to whatever interest the said John Watts acquired by the said deed or had as the son and heir of John S. Watts, [15] deceased. By reason of the title bond referred to in paragraph 9 hereof and the deed of January 8, 1870, from John S. Watts to Christopher E. Hawley, referred to in paragraph 6 hereof, the children and heirs of John S. Watts, at the time of the execution of the several deeds referred to in this paragraph, had no right, title or interest in or to said land or any portion thereof, and could convey and did convey nothing to John Watts or through him and his grantees to the defendant Santa Cruz Development Company.

23a. By reason of the premises defendants or some of them claim some right, title or interest in said land adverse to plaintiffs.

24. Prior to August 3, 1899, Alex F. Mathews

- and S. A. M. Syme by mesne conveyance had become the owners of the land conveyed by Jno. S. Watts to Christopher E. Hawley by a deed, exhibit "A."
- 25. Prior to February 8, 1907, the said Alex F. Mathews died leaving a last will and testament dated September 22, 1900, and probated in Greenbrier County, West Virginia, January 2, 1907, wherein and whereby he nominated his sons, Mason Mathews, Charles G. Mathews, and Henry A. Mathews, executors thereof, and devised his estate to be distributed in accordance with the laws of West Virginia in force concerning the estates of persons who die intestate, authorizing and empowering his executors to sell any of his property for the purpose of converting it into money in order to make distribution and apportionment and to execute all papers necessary to carry out such sales without recourse to any court, and to execute on behalf of the estate any papers proper, necessary or convenient for carrying out any agreements into which he might have entered, [16] without recourse to any court, with the same force and effect as if said executors were acting under the authority and direction of a court of competent jurisdiction.
- 26. On or about February 8, 1907, the said Samuel A. M. Syme, and the heirs, devisees and legal representatives of the said Alex F. Mathews sold and conveyed the land conveyed by the deed from Watts to Hawley, exhibit "A," referred to in paragraph 6 hereof, to the plaintiffs by deed which was duly recorded in Santa Cruz County, Arizona, in book 7 of Deeds of Real Estate at page 546, and over

since February 8, 1907, plaintiffs have been and are now the owners of said land.

- 27. The plaintiffs pray leave upon the hearing to refer to the originals or copies of the various deeds, agreements or other instruments in this complaint mentioned, described or referred to as the same may be produced upon said hearing for a more detailed, particular and accurate description thereof, and for proof of the allegations in reference thereto.
- 28. The value of the land described in paragraph 2 of the complaint herein is upwards of \$100,000; and the interest of the plaintiffs therein is upwards of \$100,000. The plaintiffs are in possession of said land.

WHEREFORE, the plaintiffs demand judgment against the defendants:

First: That the deed, dated January 8, 1870, and recorded in Santa Cruz County, Arizona, in book 1 of Deeds of Real Estate (Transcribed) at page 562, from John S. Watts to Christopher E. Hawley and described and referred to in paragraph 6 of the complaint herein conveyed to said Hawley the tract of land in Santa Cruz County, Arizona, known as Baca Float No. 3, granted to the heirs of Luis Maria Baca by act of Congress approved June 21, 1860, and by said heirs [17] conveyed to said John S. Watts, and bounded and described as follows:

"Commencing at a point one mile and a half from the base of the Salero Mountain in a direction North forty-five degrees east of the highest point of said mountain, running thence from the said beginning point West twelve miles, thirty-six chains and forty-four links; thence South twelve miles, thirty-six chains and forty-four links; thence East twelve miles, thirty-six chains and forty-four links; and thence North twelve miles, thirty-six chains and forty-four links to the place of beginning."

including all the right, title, interest, claim and demand of the heirs of Luis Maria Baca or their descendants, and of John S. Watts and his heirs and their descendants.

Second: That at the times the instruments referred to in paragraph 12 of the complaint herein were executed, the grantors thereon had no title to said land or any portion thereof as heirs of Luis Maria Baca or as heirs of John S. Watts, and could and did convey nothing to David W. Bouldin, if said instruments be considered to be conveyances; and, if said instruments be considered agreements to give said Bouldin a two-thirds interest in the property if he succeeded in perfecting the title, he failed to do so and never became entitled to such interest.

Third: That the agreement of John C. Robinson of June 8, 1885, referred to in paragraph 13 of the complaint herein to give David W. Bouldin a half interest in the land relocated in consideration of said Bouldin's relocating the Float under the order of the Commissioner of the General Land Office of March 12, 1885, was void on account of said order being without authority and void; and that the agreement as to the division of interests in the said land between John C. Robinson and Powhatan W.

Bouldin and James E. Bouldin, referred to in paragraph 16 of the complaint herein, and the instrument, referred to in paragraph 18 of the complaint herein, purporting to convey the north half of the said land to Powhatan W. Bouldin and James E. Bouldin, are based on said agreement of June 8, 1885, and void.

Fourth: That the defendants, James E. Bouldin, Jennie N. Bouldin, John Bouldin and Mary Bouldin have no right, title or interest in or to the said land or any portion thereof. [18]

That the instrument of February 21, 1885, Fifth: executed by David W. Bouldin and purporting to convey to John Ireland and Wilbur H. King an undivided one-third of one-third of the said land did not convey any interest therein, and the sale and conveyance by the sheriff under the execution on the judgment against Leo Goldschmidt as administrator of the estate of David W. Bouldin, deceased, referred to in paragraph 21 of the complaint herein, did not convey anything; and that the defendant, Joseph E. Wise did not get any title to the said land or to any portion thereof by the purported conveyances to him from the widow of John Ireland and from Wilbur H. King, referred to in paragraphs 21 of the complaint herein.

Sixth: That the various conveyances from persons claiming to be descendants of one or more of the heirs of Luis Maria Baca to Joseph E. Wise and to Jesse H. Wise between March 13, 1907, and September 17, 1913, referred to in paragraph 22 hereof, did not convey any right, title or interest to the said

Wises or either of them in or to the said land or in or to any portion thereof.

Seventh: That the defendants, Jesse H. Wise, Lucia J. Wise, Joseph E. Wise, and Margaret W. Wise have no right, title or interest in or to the said land or in or to any portion thereof.

Eighth: That the deeds from J. Howe Watts, Mary A. Wardwell, Louise Wardwell, Frances A. Bancroft and Albert L. Bancroft to John Watts and from John Watts and his grantees to the defendant Santa Cruz Development Company conveyed nothing and the defendant Santa Cruz Development Company has no right, title or interest in or to the said land or in or to any portion thereof.

Ninth: That the defendants, James E. Bouldin, Jesse H. Wise, Lucia J. Wise, Jennie N. Bouldin, John Bouldin, Mary Bouldin, Joseph E. Wise, Margaret W. Wise, W. C. Rifenburg, and Santa Cruz, Development Company, be forever foreclosed from making any claim on account of the matters alleged in the complaint herein to the said land or any portion thereof.

Tenth: That the mortgage from David W. Bouldin to W. G. Rifenburg, dated October 6, 1886, referred to in [19] paragraph 14 of the complaint herein, conveyed nothing and the defendant, W. G. Rifenburg, and any person claiming by, through or under him, has no right, title or interest in or to the said land or in or to any portion thereof.

Eleventh: That your orators may have such

other, further and general relief as the circumstances of the case require.

S. L. KINGAN,

Solicitor for Plaintiffs.

HARTWELL P. HEATH,

Of Counsel.

Verified March 26, 1915.

[Note as to Exhibits "A," "B" and "C."]

Exhibit "A" being the same as Plaintiffs' Exhibit "N"; Exhibit "B" being the same as Defendant Wise's Exhibit 14; Exhibit "C" being the same as Defendant Wise's Exhibit 16.

[Paragraph X of Original Bill.]

Paragraph X of the original bill filed June 23, 1914, read as follows:

10. On or about January 13, 1870, the said Christopher E. Hawley made a declaration of trust in which he stated that he held the said land as trustee for James Eldredge and Charles D. Poston. The interest of said Charles D. Poston in said land depended on a contingency which never occurred and consequently said interest never attached to said land and, though said Poston lived in the immediate neighborhood of said land until his death a few years ago, he made no claim to have any interest in said land. Upon information and belie whatever interest said Poston had was subsequently acquired by plaintiffs.

[Note as to Paragraph 24 of Original Bill.]

Paragraph 24 of the original bill related to the transaction between Alex. F. Mathews and S. A. M.

Syme and the Arizona Copper Estate of August 3, 1899, and to the [20] instruments executed by the parties in connection therewith.

Amended Answer of Santa Cruz Development Company.

Filed August 19, 1914.

Santa Cruz Development Company, one of the above-named defendants, by G. H. Brevillier, its solicitor, comes and makes the following amended answer to the bill herein as amended:—

First. This defendant alleges that there is a defect of parties defendant herein in that The Arizona Copper Estate, referred to in said bill, and recited in the conveyance to it set forth in the bill to be a corporation organized and existing under the laws of Arizona, is not made a party defendant herein.

Second. Further answering the bill herein, this defendant alleges that more than fifteen years have passed since the said conveyance by Mathews and Syme to The Arizona Copper Estate, and that more than thirteen years have passed since the last of the notes referred to in the mortgage made by said The Arizona Copper Estate to said Mathews and Syme recorded in book 15 of Mortgages, page 60, in the office of the recorder of Pima County, Arizona, and referred to in the bill, became due and payable, and upon information and belief, no act or action at law, in equity or otherwise, has ever been begun, taken, or instituted by said Mathews and Syme, or either of them, or the plaintiffs herein, or either of them (except their action in this court known

as No. E-4 Tucson and filed on June 23, 1914) or by any person or persons in their behalf, or person or persons claiming by, from, through or under them or either of them, toward the exercise of any right or remedy whatsoever with reference to said The Arizona Copper Estate, and [21] that all rights and remedies of the plaintiffs herein or either of them with reference to said The Arizona Copper Estate, in any matter or thing whatsoever, are now barred by their gross laches and by every statute or rule of limitation of the United States of America, or of the Territory of Arizona, or the State of Arizona, and upon information and belief, it denies that there is any instrument in writing signed by or on behalf of The Arizona Copper Estate expressing or evidencing the intention of the parties to the transactions with it aforesaid, except the deed to it, and the mortgage from it as hereinbefore stated.

Third. Further answering each and every allegation in the bill with reference to the instrument executed by John S. Watts in favor of Christopher E. Hawley, copy of which is attached as exhibit A, to the bill, this defendant avers that no attempt, demand or request in the form of proceedings at law or in equity, or otherwise, was ever made, begun or instituted by said Christopher E. Hawley, or any person or persons claiming by, from, through or under him, to have said instrument reformed or corrected in any way, but that more than forty-four years have passed since said instrument was executed and delivered, and that said Christopher E. Hawley and all persons claiming by, from, through, or under

him, including the plaintiffs, have been guilty of gross laches in not seeking to reform or correct said instrument, in case it did not express the true meaning of the parties, and that any attempt so to do is now barred by every statute or rule of limitation of the State of Arizona, or of the former Territory of Arizona, or of New Mexico, or of Indiana, or of California, or of any other state or territory or jurisdiction, or of the United [22] States of America: and this defendant avers that it is informed and verily believes that said Christopher E. Hawley, and all persons claiming by, from, through or under him, never contended or believed that said instrument covered anything except the interest of said John S. Watts in that Baca Float No. 3 known as the attempted amended location of 1866, until the rejection of said location in 1899.

Fourth. Answering the paragraph or section of the bill marked "5," it denies that the persons executing said deed of May 1, 1864, were all the heirs of Luis Maria Baca, deceased.

Fifth. Answering the paragraph or section of the bill, marked "6," this defendant denies that said John S. Watts sold or conveyed to said Christopher E. Hawley or any other person or corporation, Baca Float No. 3, located as set forth in paragraph "2," of the bill, or that he ever sold to said Christopher E. Hawley, or any other person or corporation, Baca Float No. 3, as set out in paragraph "7," of the bill, but it admits that on January 8, 1870, said John S. Watts, by the instrument

set out as exhibit "A" of the bill, quitclaimed to Christopher E. Hawley the interest which said grantor then had in the right to obtain the approval of Baca Float No. 3, according to the location of 1866, referred to in paragraph "7," of the bill, or in the land included within that Baca Float No. 3 known as the location of 1866.

Sixth. Answering the paragraph or section of the bill marked "7," this defendant denies that John S. Watts applied for leave to amend the description under the belief that it was simply an amendment of the selection and location as made on June 17, 1863, but, on the contrary, this defendant avers [23] that said location of 1866 was intended as a new or relocation of the location of June 17, 1863; and it denies that between May 21, 1866, until July 25, 1899, or at any time between said periods, all or any of the parties interested, except those claiming under the deed to Hawley as aforesaid, believed or contended that Baca Float No. 3 was described only by the metes and bounds of the so-called amended location of 1866, and it denies that the actual metes and bounds of said location of 1863, or of said location of 1866, had not been determined prior to July 25, 1899, but on the contrary, it avers that said locations had been noted by the officials of the Land Department on its records and maps and were known to the parties claiming under the deed to Hawley, as aforesaid, for a long time prior thereto. It alleges that said Hawley, or his grantees, repeatedly and continuously from 1870 to June, 1899, applied to the Land Department of the United States with full

knowledge of said 1863 location, for a confirmation of said location of 1866, as described in the said deed to Hawley.

Seventh. Answering the paragraph or section of the bill marked "8," it denies that John S. Watts intended to, or did, convey to said Hawley by said deed attached to the bill as exhibit "A," Baca Float No. 3 as set forth in paragraph "2," of the bill, and it denies that there was any mistake in the statement of metes and bounds or description in said deed, but on the contrary it avers that said John S. Watts intended to and did quitclaim to said Christopher E. Hawley the interest which said John S. Watts then had to obtain the approval of that Baca Float No. 3, known as the attempted amended location of 1866, or to quitclaim to said Hawley the interest of said John S. Watts at that time in the land [24] specifically described in said deed by metes and bounds. It avers that there is no instrument in writing signed by John S. Watts expressing the intention of the party to said deed, copy of which is attached to the bill as exhibit "A," except said deed itself.

Eighth. Answering the paragraph or section of the bill marked "9" it denies the construction placed by the plaintiffs on the deed attached to the bill as exhibit "A," and alleges that it is without knowledge, information or belief as to all or any of the other matters set forth in paragraph "9," of the bill.

Ninth. Answering the paragraph or section of the

bill marked "10" it denies that the interest (if any) of Charles D. Poston in said land depended on a contingency which never occurred, and it is without knowledge, information or belief as to whether or not the interest of said Poston, if any, was subsequently acquired by the plaintiffs or either of them, and it avers that it is without knowledge, information or belief as to whether or not said Poston ever made any claim to any interest in said land.

Tenth. Answering the paragraph or section of the bill marked "11" it admits that on or about May 30, 1871, certain heirs of Luis Maria Baca ex cuted a deed to said John S. Watts, as will appear from the original of said deed when shown to the Court for its construction thereof, but it denies that such deed inured to the benefit of said Christopher E. Hawley or any person claiming by, through or under him.

Eleventh. Answering the paragraph or section of the bill marked "12," it denies that on or about September 30, 1884, or at any other time, any persons claiming to be the widow [25] or any heir of John S. Watts executed to David W. Bouldin a quitclaim or other deed of all or any part of said Baca Float No. 3. as located on June 17, 1863, and it denies that by the title bond referred to in the bill, all or any of the heirs of Luis Maria Baca, or of John S. Watts, held any title in trust for the said Christopher E. Hawley or his successors in title or the plaintiffs, or either of them, and it is without knowledge, information or belief, as to whether or not

all or any of the grantors or alleged grantors in the alleged deed of January 14, 1878, to David W. Bouldin were or was in fact an heir of said Baca; and it denies that said John Watts was the lawful attorney in fact of any of the parties for whom he is alleged to have signed said instrument of September 30, 1884, or had any power to execute it in their or any of their behalf. It avers that if there was any authority to said John Watts to execute said instrument as attorney in fact for the parties for whom it is alleged that he acted as such attorney, said authority was not in writing, and signed by the doners of the power as required by law.

Twelfth. Answering the paragraph or section of the bill marked "13," it denies that it has any knowledge, information or belief as to whether or not John C. Robinson, prior to June 8, 1885, or at any time, became the owner of the land or location quitclaimed by John S. Watts to Christopher E. Hawley, as aforesaid.

Thirteenth. Answering the paragraph or section of the bill marked "16," it avers that it is without knowledge, information or belief as to whether or not there was any mistake of fact in said agreement or partition, or whether there was any consideration therefor. [26]

Fourteenth. Answering the paragraph or section of the bill marked "19," it avers that it is without knowledge, information or belief as to all or any of the allegations set forth in said paragraph of the bill.

Fifteenth. Answering the paragraph or section of the bill marked "20," it avers that it is without knowledge, information or belief as to all or any of the allegations therein contained.

Sixteenth. Answering the paragraph or section of the bill marked "21," it avers that it is without knowledge, information or belief as to whether or not, prior to May 2, 1895, or at any time, David W. Bouldin, John Ireland and Wilbur H. King, or any of them, agreed to rescind the transaction set forth in said paragraph of the bill, or as to whether or not a note, or any obligation or any other consideration whatsoever, was given by said David W. Bouldin, to the said John Ireland, and Wilbur H. King, and as to whether or not said Ireland or King, or either of them, gave said Bouldin or any other person a bond or any agreement to reconvey said land or any part thereof to said Bouldin or any other person.

Seventeenth. Answering the paragraph or section of the bill marked "22," it avers that it is without knowledge, information or belief as to whether or not any of the persons executing the deeds to said Joseph E. Wise and said Jesse H. Wise, or either of them, were in fact heirs or descendants of said Luis Maria Baca, deceased.

Eighteenth. Answering the paragraph or section of the bill marked "23," it admits that on or about October 25, 1899, there was executed a deed to John Watts, as set forth in said paragraph of the bill and recorded as therein set [27] forth, and it avers that said persons, including said John Watts, were and were then all the heirs of said John S. Watts and of his widow. It further avers that it is, for

value and without any notice of any alleged mistake in said deed to Hawley or any intention by that grantor therein to convey the location of 1863 or any part thereof, the sole owner in fee simple of the entire Baca Float No. 3 as located on June 17, 1863, with the exception of a small part thereof known as the Alto group of mines in the northeasterly part of said Float, sold on June 29, 1914, by the sheriff of Santa Cruz County, Arizona, under a judgment duly recovered in favor of the State of Arizona for taxes in an action in the Superior Court of the said State, Santa Cruz County, in which said State was plaintiff and The Alto Copper Company and others were defendants, as will fully appear by the record of the proceedings in said action on file in the office of the clerk of said court, and in the office of the recorder of Santa Cruz County aforesaid. It denies that by reason of the title bond referred to in paragraph "9" of the bill, and the deed to Hawley, or either of them, any interest or estate whatsoever in said Baca Float No. 3, as located on June 17, 1863, passed to said Christopher E. Hawley, his heirs, legal representatives or assigns. It avers that said John S. Watts died intestate on June 11, 1876, a resident of Bloomington, Indiana, leaving to survive him as his sole heir at law his widow, Elizabeth A. Watts, and five children, namely: John Watts, J. Howe Watts, Mary A. Wardwell, Louise Wardwell and Frances A. Bancroft; and that said Elizabeth A. Watts died intestate on May 23, 1893, a resident of Berkeley, Calif., leaving to survive her as her sole heirs at law her children above named, John Watts, J. [28]

Howe Watts, Mary A. Wardwell, Louise Wardwell and Frances A. Bancroft. It further avers that the entire right, title, and estate which said John S. Watts had at any time in his lifetime, or that his widow and said five children, or any of them ever had in said Baca Float No. 3 as located on June 17, 1863, has been duly conveyed to this defendant, and is now vested in and owned by this defendant, with the exception of the part known as the Alto Group of Mines as hereinbefore particularly set forth.

Nineteenth. Answering the paragraph or section of the bill marked "24" it denies that said Alex. F. Mathews and S. A. M. Syme, or either of them, prior to August 3, 1899, or at any other time, had become the owners of said Baca Float No. 3 as located on June 17, 1863, or any part thereof; and this defendant avers that it is without knowledge, information or belief as to what interest, if any, they or either of them had at any time in the location of Baca Float No. 3, known as the attempted amended location This defendant admits that said Mathews of 1866. and Syme, on or about August 3, 1899, executed to The Arizona Copper Estate, described and recited by them to be a corporation organized and existing under the laws of Arizona, all their interest in Baca Float No. 3, wherever situate and located, and that said deed was acknowledged and recorded as set out in said paragraph of the original bill and in the alleged amendment thereof. This defendant avers that the instrument appearing of record in the office of the recorder of Pima County, in book 15 of Mortgages, page 60, is not a reconveyance or conditional

sale of said premises to said Mathews and Syme, but is in fact a mortgage of whatever interest was conveyed by said Mathews and Syme, and [29] that said mortgage is in fact a mortgage to said Mathews and Syme as trustees for the holders of the notes specified in said mortgage. This defendant avers, upon information and belief, that said The Arizona Copper Estate was duly organized and existing as a corporation under the laws of the Territory of Arizona on August 3, 1899, and for some time prior thereto, and this defendant avers that said deed and said mortgage were in fact delivered to known and designated individuals who had combined in some form of association which was then and there recognized by all the parties connected therewith as a corporation. This defendant is without knowledge, information or belief as to all the other allegations of fact contained in paragraph "24" as amended, except as hereinbefore specifically admitted. It avers that said transaction was not a nullity and that title to whatever interest so owned by said Mathews and Syme passed to said The Arizona Copper Estate, or to the individuals composing it. It is without knowledge, information or belief as to how many, if any, of said notes, or of any interest in them or any of them, are now in the possession of or owned by the plaintiffs or either of them.

Twentieth. Answering the paragraph or section of the bill marked "26," it admits that on or about it is without knowledge, information or belief as to all or any of the matters stated in said paragraph.

Twenty-first. Answering the paragraph or section

of the will marked "26," it admits that on or about February 8, 1907, S. A. M. Syme and certain persons claiming to be the heirs, devisees and legal representatives of Alex. F. Mathews executed to the plaintiffs as trustees for the [30] grantors, or as the attorneys in fact for said grantors, a certain instrument in writing which was thereafter recorded in Santa Cruz County, Arizona, in book 7 of Deeds of Real Estate, at page 546, but this defendant is without knowledge, information or belief as to whether or not said persons were in fact the heirs, devisees and legal representatives of said Alex. F. Mathews, and it denies that said instrument was in fact a deed or conveyed any estate in any property to the plaintiffs, or either of them, and this defendant further denies that since February 8, 1907, or at any time, the plaintiffs, or either of them, have been or now are the owners of said Baca Float No. 3, as located on June 17, 1863, or any part thereof.

Twenty-second. Answering the paragraph or section of the bill marked "27," it denies that the interests of the plaintiffs, or either of them, in said Baca Float No. 3, as located on June 17, 1863, is worth the sum of One Hundred Thousand (\$100,000) Dollars or any sum whatsoever, and it denies that the plaintiffs are or either of them is in possession of said land.

WHEREFORE, this defendant demands judgment against the plaintiffs dismissing the bill with costs and adjudicating that said instrument attached to the bill as exhibit "A," conveyed no interest in Baca Float No. 3 as located on June 17, 1863, and

that neither the plaintiffs or either of them, have any interest or estate in said Baca Float No. 3, as located on June 17, 1863; that the title thereto (with the exception of the Alto property aforesaid) is in this defendant; and that this defendant may have such other and further relief as the Court may deem proper.

SANTA CRUZ DEVELOPMENT COM-PANY.

[Seal]

By JAMES W. VROOM,

President.

G. H. BREVILLIER,

Its Solicitor.

Verified August 13, 1914. [31]

Amended Answer of Joseph E. and Lucia J. Wise. Filed March 11, 1915.

To the Honorable, the Judge of the District Court of the United States, in and for the District of Arizona, and to the Honorable District Court of the United States, in and for the District of Arizona:

Come now the defendants, Joseph E. Wise and Lucia J. Wise, his wife, and for amended answer to the bill of complaint of the plaintiffs herein, do make the following reply and defense thereto.

1. Answering the section or paragraph marked 5 of the said bill of complaint, these defendants deny that on or about May 1, 1864, all the heirs of Luis Maria Baca sold and conveyed Baca Float No. 3 to John S. Watts, by deed, duly executed and acknowledged, as alleged in said bill; but they admit that

some of the heirs of said Luis Maria Baca did execute, on or about May 1, 1864, their quitclaim deed, wherein they did remise, release and quitclaim unto the said John S. Watts their respective interests in and to said Baca Float No. 3, according to the description set forth in section 2 of the bill; but these defendants aver that certain other of the heirs of the said Luis Maria Baca owning more than an undivided one-half of said lands and premises did not execute and did not sign or acknowledge the said deed, and further allege that under and by virtue of said deed, the said John S. Watts acquired less than an one-half interest in and to said Baca Float No. 3, aforesaid.

They deny that on or about January 8, 1870, or at all, the said John S. Watts sold or conveyed the said Baca Float No. 3 to one Christopher E. Hawley as alleged in paragraph 6 of said complaint, or that any such deed was duly [32] executed or acknowledged or recorded; but they aver that they are informed and believe that on or about said January 8, 1870, the said John S. Watts did execute and deliver to said Christopher E. Hawley a deed of quitclaim wherein he did remise, release and quitclaim unto said Christopher E. Hawley, the certain property therein described, a copy of which deed is marked exhibit "A" and attached to plaintiff's bill of complaint, and they admit that said deed of quitclaim was duly acknowledged and recorded as alleged in said complaint; and they further deny that said deed did convey to said Hawley said Baca Float No. 3, but allege that the same did remise, release and quitclaim to said Hawley, only whatever interest the said Watts may then have had in that certain and specific piece of land which is specifically described or attempted to be specifically described in said deed.

3. Answering the paragraph or section of the bill marked "7," these defendants deny that John S. Watts applied for leave to amend the description under the belief that it was simply an amendment of the selection and location as made on June 17, 1863, but on the contrary, these defendants aver that said location of 1866 was intended as a new or relocation of the location of June 17, 1863; and they deny that between May 21, 1866 and July 25, 1899, or at any time between said periods, all or any of the parties interested, except those claiming under the deed to Hawley as aforesaid, believed or contended that Baca Float No. 3 was described only by the metes and bounds of the so-called amended location of 1866, and they deny that the actual metes and bounds of said location of 1863, or if said location of 1866, had [33] not been determined prior to July 25, 1899, but on the contrary, they aver that said location had been noted by the officials of the Land Department on its records and maps and were known to the parties claiming under the deed to Hawley, as aforesaid, for a long time prior thereto. They allege that said Hawley, or his grantees, repeatedly and continuously from 1870 to June, 1899, applied to the Land Department of the United States with full knowledge of said 1863 location, for a confirmation of said location of 1866 as described in the said deed to Hawley.

- 4. Answering the paragraph marked "8" of the bill, these defendants deny that said John S. Watts intended to convey to Christopher E. Hawley by the deed of January 8, 1870, exhibit "A," Baca Float No. 3, as the same is described in paragraph 2 of said bill of complaint; and they deny that said John S. Watts did convey to said Christopher E. Hawley by said deed of January 8, 1870, aforesaid, the said Baca Float No. 3, as described in paragraph 2 of said bill of complaint; they deny that the description by metes and bounds in said deed of January 8, 1870, exhibit "A" to plaintiff's complaint was executed under the mistaken belief existing at the time said deed was made, as to the metes or bounds of the said Float, as alleged in paragraph 8 of said complaint, or at all.
- 5. Answering the paragraph marked "9" of said bill, these defendants deny that the correct construction to be put on the said deed of January 8, 1870, exhibit "A," is supported by any of the facts alleged in paragraph 9 of said complaint; and not having sufficient information to form a belief, these defendants deny that the said John S. Watts on or about March 2, 1863, or at all, executed or [34] delivered to one William Wrightson, as alleged in paragraph 9 of said complaint, or at all, a title bond for said Baca Float No. 3, or that prior to January 8, 1870, the said Christopher E. Hawley did become entitled to or was in possession of said title bond, or was entitled thereunder to have a fee simple to said Baca Float No. 3, as described in paragraph 2 of said complaint, made to him; and these defendants deny

that the said plaintiffs, as successors in title to said Hawley, or at all, now own or possess said title bond.

- 6. Answering the paragraph marked "10" of said bill, these defendants admit that on or about January 13, 1870, the said Christopher E. Hawley made a declaration of trust in which he stated that he held certain lands as trustee for James Eldredge and Charles D. Poston, and aver that the lands he so referred to were the lands described in the said deed from John S. Watts to Christopher E. Hawley, of date January 8, 1870, exhibit "A," aforesaid. These defendants not having sufficient information to form a belief and not knowing what the terms of the said trust were, deny that the interest of said Charles D. Poston, in the lands referred to in said declaration of trust, depended on a contingency which never occurred, as alleged in paragraph 10 of said complaint or at all, and deny that consequently, or at all, said interest never attached to said land, or that the said Charles D. Poston made no claim to have any interest in said land.
- 7. Answering the section or paragraph marked "11" of the said bill of complaint and the amendments thereto of the plaintiffs herein, these defendants admit that on or about May 30, 1871, all of the heirs of Luis Maria Baca, [35] except, however, those particular heirs who thereafter conveyed their interest in said Baca Float No. 3 to David W. Bouldin, as hereinafter in this answer and amendment to said answer set forth, and also except Antonio Baca who was a son and heir of said Luis Maria Baca and also except the heirs of said An-

tonio Baca, did execute a deed to the said John S. Watts wherein they did convey to said Watts all their interest in the said Baca Float No. 3, according to the 1863 location thereof; but these defendants deny that any of said heirs ratified or confirmed the title made by them or any of them or by their attorney Tomas Cabeza de Baca to John S. Watts, as alleged in said bill of complaint, or at all; these defendants admit that those particular heirs of said Luis Maria Baca who signed, executed and acknowledged in their own proper name the said deed of date the 1st day of May, 1864, and referred to in section 3 of the bill of complaint herein, did ratify and confirm the said deed of May 1, 1864; but they deny that any of the other heirs of said Luis Maria Baca, or that any of the heirs who did not duly sign, execute and acknowledge the said deed of May 1, 1864, did ratify or confirm the said alleged deed of 1864; and these defendants admit that all of the heirs of said Luis Maria Baca, except those heirs who thereafter conveyed their interest to said David W. Bouldin and to the defendant Joseph E. Wise and defendant Jesse H. Wise, as hereinafter set forth, did, by the said deed of date May 30, 1871, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in and to said Baca Float No. 3, and being the property described in said deed of May 1, These defendants deny that the said deed of May 30, 1871, being the deed mentioned in section 11 of the bill, inured to the benefit of the said Christopher E. Hawley and deny that it cured

any defect that might have existed or did exist from the manner in which the deed to John S. Watts of May 1, 1864, was signed or executed or acknowledged, on behalf of some or any of the heirs of Luis Maria Baca, or at all; and these defendants further deny the allegations as set forth in the amendment of plaintiffs to the said section 11 of their bill, that the persons who executed the said deed of May 1, 1864, were all the heirs of said Luis Maria Baca and they deny that all the heirs of said Luis Maria Baca executed, or pretended to execute, said deed; and they deny that all the persons executing the deed, aforesaid, of date May 30, 1871, were all the heirs of said Luis Maria Baca; but they allege that there were other heirs of said Luis Maria Baca who did not execute, or pretend to execute, the said deed.

These defendants further aver that they are informed and believe and therefore allege the fact to be that the said deed of date May 30, 1871, has not been recorded in the county of Pima, State of Arizona; defendants further aver that the deeds executed by certain of the heirs of said Luis Maria Baca to David W. Bouldin, as hereinafter set forth, and also the deed executed by certain other heirs of said Luis Maria Baca to the defendants Joseph E. Wise and Jesse H. Wise, as hereinafter set forth, were duly recorded in the said county of Pima, when the said lands in dispute were situated in said county or were recorded in the said county of Santa Cruz, in which the said lands are now situated; that the said David W. Bouldin and the said

defendant Joseph E. Wise each was an innocent purchaser [37] for a valuable consideration, of all of the interest conveyed to them and each of them under the said deeds aforesaid, and hereinafter set forth; that by reason thereof the said deed to said John S. Watts of date May 30, 1871, is null and void as against the prior recorded deed executed by certain heirs of said Luis Maria Baca to said David W. Bouldin, as hereinafter set forth, and also as against the deeds executed by other certain heirs of said Luis Maria Baca to defendants Joseph E. Wise and Jesse H. Wise, as hereinafter set forth and the said deeds last mentioned take precedence over the said deed to John S. Watts of date May 30, 1871.

- 8. Answering the paragraph marked "12" of said bill, these defendants deny that, by the title bond referred to in the said complaint, all or any of the heirs of Luis Maria Baca, or of John S. Watts, held the title, if any remained in them, in view of the deeds of May 1, 1864 and May 30, 1871, and of January 8, 1870, referred to in said bill of complaint, in trust for the said Christopher E. Hawley, or his successors in title, or of the said plaintiffs, as alleged in paragraph 12 of said complaint, or at all. And these defendants, not having sufficient information to form a belief, deny that said David W. Bouldin did not in any manner or to any extent perform the agreements on his part as alleged in paragraph 12 of said complaint, or at all.
- 9. Answering the paragraph marked "13" of said bill, these defendants deny that on June 8, 1885,

the said John C. Robinson, was, or that at any time prior to said 8th day of June, 1885, said John C. Robinson had been the owner of the land conveyed by John S. Watts to Christopher [38] E. Hawley by deed of January 8, 1870; referred to in paragraph 6 of said complaint, or at all; these defendants not having sufficient knowledge or information to form a belief, deny that on or about June 8, 1885, the said Robinson entered into an agreement with the said David W. Bouldin, as alleged in paragraph 13 of said complaint or at all; and these defendants deny that said alleged agreement between the said Robinson and the said David W. Bouldin was, in its inception, or at all, or at any times impossible of performance by the said David W. Bouldin, or was void, or that the said David W. Bouldin never could carry out said agreement on his part, or never performed any part thereof, or that the said David W. Bouldin never became entitled to a half or any interest in the said agreement, in any land whatever, as alleged in paragraph 13 of said complaint or at all.

10. Answering the paragraph marked "14" of the bill, these defendants deny that at the time the said David W. Bouldin attempted to make, or did make, the mortgage mentioned and referred to in paragraph 14 of said complaint, he, the said David W. Bouldin, had no other or better title than was conveyed to him by the instruments particularly described in paragraphs 12 and 13 of said complaint; but allege that the said David W. Bouldin did have other title at said time than the title which was

conveyed to him by the said instruments particularly described in paragraphs 12 and 13 of said complaint.

10a. Answering the paragraph marked "15" of the bill, these defendants deny that at the time said David W. Bouldin made, or attempted to make, the deed or instrument in the form of a deed, mentioned and referred to in said paragraph [39] 15, the said David W. Bouldin had no other or better title than was conveyed to him by the instrument particularly described in the paragraphs marked "12" and "13" of said bill, or either thereof; but these defendants allege that David W. Bouldin had other title which was conveyed to him by other deeds than those mentioned in the said paragraphs 12 and 13.

11. Answering the paragraph marked "16" of the bill, these defendants not having sufficient information to form a belief, deny that the agreement referred to in paragraph 16 of said complaint, being the agreement between the said John C. Robinson and Powhatan W. Bouldin and James E. Bouldin, by the said David W. Bouldin, as their attorney in fact, was made on the sole consideration of the agreement of June 8, 1885, described in paragraph 15 of said complaint; but these defendants allege that they are informed and believe that there were other and valuable considerations for the execution of said agreement aforesaid; and these defendants further deny that said agreement of June 28, 1892, between John C. Robinson and the said Bouldins, referred to in paragraph 16 of said complaint was made under a mutual mistake of fact; and they deny that the same was without consideration and deny that the same was void. And in this behalf these defendants aver that these plaintiffs have no right or authority to attack the validity of said agreement; that more than twenty years have elapsed since the execution of said agreement and that neither the said John C. Robinson, nor anyone claiming under him, nor these plaintiffs, have any right, at this late date, to seek to have the said agreement annulled, on any ground whatsoever, and that any right of action for the purpose of having the said agreement annulled or for the purpose of having the same declared void is barred by [40] the statute of limitations of the State of Arizona, and that the said John C. Robinson, and all persons claiming under him, including these plaintiffs, have been guilty of laches, in not bringing a suit within the time limited by the statutes of limitations and in not bringing a suit within a reasonable time, for the purpose of cancelling said agreement, either for mutual mistake or for lack of consideration or for any other reason, and the said plaintiffs are now barred from raising any such question, or seeking any such relief.

12. Answering the paragraph marked "17" of the bill, these defendants deny that at the time the said David W. Bouldin made the deed mentioned in paragraph 17 of the complaint herein, that the said David W. Bouldin had no other or better title to the lands sought to be conveyed than was conveyed to him by the instrument described in paragraph 12,

13 and 16 of said complaint.

13. Answering the paragraph marked "18" of the bill, these defendants allege that the instrument in the form of a deed which on or about November 19, 1892, was executed by John C. Robinson to the said Powhatan W. Bouldin and James E. Bouldin, was in fact a deed and was duly acknowledged and recorded as required by law, being the deed mentioned and referred to in paragraph 18 of said complaint; and these defendants deny that said deed falls with the said instrument of June 28, 1892, as alleged in said paragraph 18 of said complaint, or at all.

14. Answering the paragraph marked "19" of the bill, these defendants deny that whatever interest the said Powhatan W. Bouldin and James E. Bouldin, or either of them, took by reason of the instrument mentioned in said complaint and referred to in paragraph 19 of said complaint, is now [41] vested one-half in the defendant Jennie N. Bouldin and one-half in the defendants John Bouldin and Mary Bouldin, who are infants; and in this behalf these defendants allege that prior to the execution of the said instrument to said Powhatan W. Bouldin and James E. Bouldin, to wit, on or about February 21st, 1885, the said David W. Bouldin did, by deed dated on said day which was duly acknowledged and thereafter and on the 19th day of June, 1885, was duly recorded in the office of the county recorder of said Pima County, convey to John Ireland and Wilbur H. King, an undivided one-ninth of all the right, title and interest which he, the said David W. Bouldin had on said day in and to the said Baca Float No. 3, according to the description thereof in paragraph 2 of the complaint herein; and defendants further allege that the defendant Joseph E. Wise does claim a large interest under and by virtue of certain deeds executed to him by the said Wilbur H. King and the widow of said John Ireland, as hereinafter set forth.

- 15. Answering the paragraph marked "20" of the bill, these defendants not having sufficient information to form a belief, deny that on or about February 7, 1894, the said John C. Robinson gave a power of attorney to S. A. M. Syme, as alleged in paragraph 20 of said complaint, or at all, or that the consideration for the said deed referred to in said paragraph 20 was certain acts to be done, and certain promises to be performed by the said Bouldins, or that the entire consideration for the said deed had wholly failed; or that the said deed had thereby become void or of no effect or voidable, at the election of said Robinson, or at all, or that said Robinson had elected to repudiate said deed.
- 16. Answering the paragraph marked "21" of the bill, [42] these defendants aver that the instrument in the form of a deed which, in paragraph 21 of said complaint, plaintiffs allege was, on or about February 21, 1885, executed by the said David W. Bouldin, was, in fact a deed, and that the same was duly executed and was duly recorded, and that the same was a good deed of conveyance and did convey to the said grantees therein named, to wit: To John Ireland and Wilbur H. King, all of the right, title and interest and all the property which

it did purport to convey; and these defendants deny that at that time, the said David W. Bouldin had no right or title or interest in or to any part of said land. Defendants deny that prior to May 2, 1895, or at any other time, the said David W. Bouldin and John Ireland and Wilbur H. King, or any of them, agreed to rescind the transaction in which said deed was given; and not having sufficient information to form a belief, these defendants deny that David W. Bouldin gave the said John Ireland and Wilbur H. King, or either of them, his note for the money which had been paid by the said Ireland and King and that the said Ireland and King gave the said Bouldin a bond to reconvey said land to him. These defendants admit that a judgment was obtained by said Ireland and King, or one of them, against Leo Goldschmidt, as administrator of the estate of said David W. Bouldin, deceased, on or about May 2, 1895, said judgment being rendered and entered by the District Court of the First Judicial District of the Territory of Arizona, in and for Pima County, and that an execution or order of sale was issued under said judgment and that the sheriff of said Pima County sold and conveyed to said Wilbur H. King all the right, title and interest which said David W. Bouldin or his estate had in [43] and to the lands described in paragraph 2 of the complaint herein on July 31, 1895; but they deny that said interest was nothing, but on the contrary, they allege that said David W. Bouldin or his estate did have an interest on said day; and they further aver that the said Wilbur H.

King did become the owner under and by virtue of said sheriff's deed of all of the interest which the said David W. Bouldin or his estate had in said Baca Float No. 3 on the said 31st day of July, 1895. These defendants admit that on or about April 8, 1907, the widow of John Ireland did execute a deed conveying to defendant Joseph E. Wise, all of her right, title and interest in and to said Baca Float No. 3, and that on or about April 24, 1907, the said Wilbur H. King did execute to defendant Joseph E. Wise, his deed wherein he did convey to the defendant, all his right, title and interest in and to said Baca Float No. 3, as described in paragraph 2 of the complaint. But defendants deny that for the reasons stated in the said complaint of plaintiffs, and deny that for any reasons whatsoever, the said deeds just mentioned, or either of them, conveyed no title to any portion of said land, or conveyed no interest therein to said defendant Joseph E. Wise; but on the contrary these defendants allege that said deeds did convey to said Joseph E. Wise a large and substantial interest in and to said land and premises. And these defendants further aver that the said judgment aforesaid is final and conclusive and that plaintiffs, and all other persons, are estopped from again raising or questioning any of the matters or things which were decided, concluded or adjudged, in and by the said judgment, aforesaid, and particularly are estopped from denying the validity of the said judgment. [44]

17. Answering the paragraph marked "22" of said bill, these defendants deny that by reason of

the title bond referred to in paragraph 9 of said complaint, or for any other reason, or that by reason of the deeds of May 1, 1864, or May 30, 1871, referred to in paragraphs 5 and 11 of said complaint, of any other deeds, the person executing the said deeds to said defendants Joseph E. Wise, and his brother Jesse H. Wise, mentioned and referred to in paragraph 22 of said complaint, being deeds executed to said last two named defendants by descendants of Luis Maria Baca, had no title to convey; and deny that the said Wises, or either of them, took nothing by said deeds.

17a. Answering the paragraph marked "23" of said bill, these defendants, deny that by reason of the title bond referred to in paragraph 9 of the bill and of the deed of January 8, 1870, from John S. Watts to Christopher E. Hawley, referred to in paragraph 6 hereof, the children and heirs of John S. Watts at the time of the execution of the deeds referred to in said paragraph 23 of the bill, had no right, title or interest in or to the said land mentioned in their deeds, and deny that they could convey nothing at said time through said deeds; but these defendants allege that at the said time the said children of said John S. Watts did have a small undivided interest in the said lands and premises aforesaid.

18. Answering the paragraph marked "23a" of said bill, these defendants admit that the said Joseph E. Wise, does claim some right, title and interest in said land, as the owner of an undivided interest therein, as hereinafter more fully set forth, and that

he is the sole owner of a certain part thereof, as hereinafter fully set [45] forth; deny that the said plaintiffs are the owners of all or any part of said land, or the owners of all or any right, title or interest in and to said land, or any part thereof.

19. Answering the paragraph marked "24" of said bill, as amended, these defendants deny that prior to August 3, 1899, or ever or at all, the said Alex F. Mathews and S. A. M. Syme, by mesne conveyance, had become the owners of the land conveyed by John S. Watts to Christopher E. Hawley by the deed marked exhibit "A." These defendants admit that the deeds which appear of record, as alleged in said paragraph 24, do appear of record, and these defendants aver that they are without knowledge, information or belief as to all or any of the other allegations set forth in said paragraph 24 of said bill as amended.

19a. Answering the paragraph of the bill marked "25," these defendants aver that they are without knowledge, information or belief as to all or any of the matters stated in said paragraph.

20. Answering the paragraph marked "26" of the bill, these defendants admit that on or about February 8, 1907, the said Samuel A. M. Syme, and certain persons claiming to be the heirs, devisees and legal representatives of Alex F. Mathews, executed to the plaintiffs as trustees for the grantors, or as the attorneys in fact for the grantors, a certain instrument in writing which was thereafter recorded in Santa Cruz County, Arizona, in book 7 of Deeds of Real Estate, at page 546, but these defendants are

without knowledge, information or belief as to whether or not said persons were, in fact, the heirs, devisees and [46] legal representatives of said Alex F. Mathews and they deny that said instrument was, in fact, a deed, or conveyed any estate in any property to the plaintiffs or either of them, and these defendants further deny that since February 8, 1907, or at any time, the plaintiffs or either of them, have been or now are, the owners of said Baca Float No. 3 located on June 17, 1863, or any part thereof.

- 21. Answering the paragraph marked "28" of the bill, these defendants deny that the interest of plaintiffs in the said lands and premises, described in paragraph 2, of the complaint herein, is upwards of \$100,000 or is of any value whatsoever; deny that plaintiffs have any interest whatsoever except as trustees, under the said trust deed or mortgage, exhibit "D," aforesaid; and deny that said interest is of the value of upwards of \$100,000 or is of any value whatsoever; for the reason that the notes to secure which said trust deed or mortgage was executed are barred by the statute of limitations. Defendants further deny that plaintiffs, or either of them are entitled to the possession of said land or to any part or parcel thereof.
- 22. Further answering the said complaint, these defendants aver that the tract or parcel of land described in paragraph 2 of said complaint is almost entirely a different tract or parcel of land than the land described in paragraph 7 of said complaint, although the two tracts of land do, to a small extent overlap each other; that the defendants are informed

and believe and therefore allege the fact to be, that the said two different tracts of land bear the relation to each other, substantially as set forth in the following diagram thereof, the tract of [47] land described in paragraph 2 of said complaint, and being the tract as selected by the heirs of Luis Maria Baca in 1863, and approved by the Commissioner of the General Land Office, is named on said diagram as follows, to wit: "Location No. 1. 1863 Location. Approved by Commissioner of General Land Office;" while the other tract of land mentioned and described in paragraph 7 of said complaint, is marked as follows, to wit: "Location No. 2. 1866 Location. valid Location," and being the location which was declared void by the Secretary of the Interior of the United States.

DIAGRAM.

12 miles, 36 oh 44 lks Location Wo. 2. M 1865 Location. Invalid Location 5 Saler Tountain Maciendo de Santa Rita Location No. 1 1863 Location. Approved by Commissioner of the General Land Office 12 miles 36 ch 44 liks



- These defendants further allege that the deed executed by John S. Watts to Christopher E. Hawley, of date January 8, 1870, being exhibit "A" to plaintiff's complaint, and referred to in paragraph 6 of said complaint, described the property in said deed remised, released and quitclaimed according to the said 1866 description aforesaid, as substantially shown by Location No. 2 on the diagram aforesaid. And these defendants aver that the only part of said Baca Float No. 3 remised, released and quitclaimed to said Christopher E. Hawley by said deed aforesaid, was that portion of the said first location of said Baca Float which is included within the limits of said second location, substantially as shown in the diagram aforesaid, and therefore that the said Hawley did not acquire any right, title or interest whatsoever in the said Baca Float No. 3, as described in paragraph 2 of said complaint, under and by virtue of said deed aforesaid, or if he did acquire any interest it was only to a small portion thereof, on the northeast corner thereof, as substantially shown in said diagram.
- 24. Defendants further allege that on or about the 14th day of January, 1878, the following persons, to wit: Rafael Parado, Dolores Baca de Parado, Jesus M. Baca, Miguel Baca, Nepomuceno Baca, Apolonia Baca de Adamson, Jacinto Barreyesa, Palencio Baca, Francisco Baca, Maria Estapana Gorduna, Jesus Maria Baca, Inez Baca, Nepomuceno Baca, Manuel Baca and Juan Baca, being heirs and descendants of heirs of said Luis Maria Baca, did, by deeds duly executed acknowledged and thereafter

and on the 25th day of March, 1885, duly recorded in the said county of Pima, State of Arizona, convey unto said David W. Bouldin, an undivided [49] two-thirds of all their right, title and interest in and to said Baca Float No. 3, as described in said first and valid description thereof, and that under and by virtue of said deeds the said David W. Bouldin became the owner of a very large interest in and to said Baca Float No. 3.

25. Defendants further aver that the defendant Joseph E. Wise claims an undivided two-thirds interest in and to said Baca Float No. 3, as described in paragraph 2 of said complaint, being the valid location thereof, under and by virtue of the following instruments, deeds and facts; that the said John S. Watts to whom was executed and delivered by the heirs of Luis Maria Baca, the various deeds alleged in the complaint and herein mentioned and referred to, died on or about June 11, 1876, leaving surviving him, his wife, Elizabeth A. Watts, and five children, to wit: John Watts, a son, J. Howe Watts, a son, Mary A. Watts, a daughter, who subsequently married W. V. B. Wardwell, Louise Watts, a daughter, who subsequently married Atwater Wardwell and Frances A. Watts, a daughter, who subsequently married A. L. Bancroft: that at the time of the death of the said John S. Watts, he was the owner of all of the interest theretofore acquired by him in and to the said Baca Float No. 3, as described in paragraph 2 of said complaint, he never having conveyed the same; that thereafter, and on or about the 30th day of September, 1884, the said widow and heirs

aforesaid, of the said John S. Watts, being then the owners of all the interest which the said John S. Watts had theretofore owned in the said Baca Float No. 3, aforesaid, and being the interest acquired by said John S. Watts in his lifetime, under the deeds executed by certain heirs of the said Luis Maria Baca, as aforesaid, did, for a [50] valuable consideration, execute and deliver to one David W. Bouldin their deed, dated on said day, wherein and whereby they did grant, sell and convey unto said David W. Bouldin, an undivided two-thirds interest in and to said lands and premises aforesaid, describing the same with the specific boundaries of said valid location, and as described in paragraph 2 of said complaint; that said deed was signed and delivered in the presence of two witnesses and thereafter and on the 25th day of March, 1885, the same was recorded in the office of the county recorder of said Pima County, in the then Territory of Arizona, in book 13 of Deeds of Real Estate at pages 13, et seq., thereof; that thereafter and on the 14th day of April, 1888, the execution of said deed was duly acknowledged before Frank P. Clark, clerk of the County Court of El Paso County, State of Texas, being a court of record having a seal, and thereafter and on the 18th day of April, 1888, the said deed was again recorded in the office of the said county recorder of said Pima County, in book 14 of Deeds of Real Estate, at pages 597, et seq. thereof.

And these defendants further aver that the deed which plaintiffs allege in their complaint was executed by the said John S. Watts to Christopher E. Hawley, on or about the 8th day of January, 1870, was not recorded in the said county of Pima, or in any other county in the Territory of Arizona, until the 9th day of May, 1885, being nearly seven months after the heirs of said John S. Watts had executed and delivered their deed aforesaid to said David W. Bouldin; and these defendants aver upon information and belief that the said David W. Bouldin was an innocent purchaser for a valuable consideration without notice [51] of the said deed from the said John S. Watts to said Christopher E. Hawley, and therefore, in any event, the said deed is invalid and of no force or effect as against the right, title and interest which said David W. Bouldin acquired under and virtue of his deed aforesaid, of date September 30, 1884.

Defendant Joseph E. Wise further avers that he claims under and by virtue of certain mesne conveyances hereinafter set forth from the said David W. Bouldin, all of the undivided two-thirds interest in and to said lands so conveyed by the widow and heirs of said John S. Watts to said David W. Bouldin, as aforesaid.

Defendant Joseph E. Wise further avers that in addition to the said undivided two-thirds interest aforesaid, he further claims all of the right, title and interest acquired by the said David W. Bouldin, in and to said Baca Float No. 3, under and by virtue of the deeds executed to the said David W. Bouldin by certain of the heirs of the said Luis Maria Baca, deceased, and fully set forth in paragraph 24 of this answer; and that he claims the said additional inter-

est in said lands and premises under and by virtue of certain mesne conveyances, hereafter set forth, from the said David W. Bouldin.

Defendant Joseph E. Wise further avers that he claims a further undivided 1/36 interest in and to said Baca Float No. 3 according to the description thereof in paragraph 2 of the complaint herein, under and by virtue of certain conveyances executed directly to him by the heirs of said Luis Maria Baca, deceased, and in this behalf these defendants allege that Antonio Baca was a son and one of the heirs of the said Luis Maria Baca and as such son and heir [52] was entitled, as near as these defendants can ascertain, to an undivided 1/18 interest in and to the said lands and premises aforesaid; that the said Antonio Baca never did convey or attempt to convey his interest to said John S. Watts, or to said David W. Bouldin, or to any other person whatsoever; that in the month of August, 1913, the heirs and descendants of the said Antonio Baca, heir of the said Luis Maria Baca, did, by deeds duly executed and acknowledged, convey all of their right, title and interest in and to said Baca Float No. 3, according to the said 1863 location, to one Marcos C. de Baca, the said deeds being duly acknowledged and being duly recorded in the office of the county recorder of Santa Cruz County, respectively as follows, to wit: In book 7 of Deeds, pages 344 et seq., 346 et seq., 348 et seq., 363 et seq.; that thereafter and on the 17th day of September, 1913, the said Marcos C. de Baca and Francisca C. de Baca, his wife, did, for a valuable consideration, duly execute,

sign and acknowledge, their deed, conveying all of the said interest of the said heirs aforesaid, to defendants Joseph E. Wise and Jesse H. Wise, which said deed is of record in book 7 of Deeds of Real Estate at page 394 et seq., in the office of the county recorder of Santa Cruz County, the same having been so recorded on the 14th day of October, 1913; and that in addition thereto Ciria Salazar, as heir of the said Luis Maria Baca, or descendant of heirs, did convey her interest to the said Joseph E. Wise and Jesse H. Wise in said lands and premises, aforesaid, by deed dated August 8, 1913, duly acknowledged and thereafter and on the 17th day of September, 1913, duly recorded in book 7 of Deeds at pages 369 et seg., in the office of the said county [53] recorder of said Santa Cruz County; that under and by virtue of said deeds aforesaid, defendant Joseph E. Wise claims an undivided 1/2 interest in and to all of the property so conveyed to him by said deeds last mentioned, as aforesaid.

Defendant Joseph E. Wise further avers that he dereigns his title to the said undivided $\frac{2}{3}$ interest acquired by him under and by virtue of the mesne conveyances from the said David W. Bouldin, as hereinafter set forth, the said David W. Bouldin having acquired his said interest as aforesaid, from the deed executed to him by the widow and heirs of said John S. Watts, aforesaid, of date September 30, 1884.

25a. That thereafter and on or about the 21st day of February, 1885, the said David W. Bouldin did, by deed dated on said day, convey to John Ire-

land and Wilbur H. King, an undivided 1/9 of his, said Bouldin's, interest, in and to said Baca Float No. 3, describing the same according to the said first and valid location thereof, which deed was duly acknowledged, delivered and was thereafter and on the 19th day of June, 1885, recorded in the office of the said county recorder of said Pima County, in book 13, Deeds of Real Estate, page 140.

That thereafter, and on or about the 13th day of March, 1893, the said Wilbur H. King and John Ireland brought suit against the said David W. Bouldin, before the District Court of the First Judicial District of the Territory of Arizona in and for the county of Pima, to recover certain sums of money, which they alleged to be due them, in which suit they did sue out a writ of attachment and on or about the said 14th day of March, 1893, they [54] caused the same to be levied upon the following property of said David W. Bouldin, to wit: The said Baca Float No. 3, as described by said valid location thereof; that pending the hearing of said action, the said David W. Bouldin died, and Leo Goldschmidt was duly appointed on or about the 20th day of April, 1895, the administrator of the estate of said David W. Bouldin, deceased, by the Probate Court of Pima County, Territory of Arizona, and that he duly qualified, on or about said day, and entered upon his duties as such administrator, and that his appointment has not been revoked; that as such administrator, the said Leo Goldschmidt was substituted as party defendant in the said suit aforesaid; that thereafter and on the 2d day of May, 1895, judgment was ren-

dered in said suit aforesaid, by said District Court, aforesaid, against the said administrator, and in favor of the plaintiffs in said action, for the amount sued on in said action, and in which said judgment the said Court did foreclose the said attachment lien, aforesaid, as the same existed on the 14th day of March, 1893, and did order the said property so attached, to be sold to satisfy the said judgment and amount found due to plaintiffs, as aforesaid; and that thereafter and on or about the 31st day of July, 1893, the then sheriff of said Pima County, to wit, R. N. Leatherwood, under the said judgment and order of said Court aforesaid, and under an order of sale duly issued thereunder, did sell at public sale, as required by law and the order of said Court, all of the right, title, interest and claim which the said David W. Bouldin had on the 14th day of March, 1895, the date of said levy of attachment aforesaid, in and to said lands and premises; that said Wilbur [55] H. King became the purchaser at sale and said property was by said sheriff, sold to him; that a certificate of sale was duly issued to him by the said sheriff of Pima County; that there was no redemption from the said sale, and that thereafter, the time for redemption having expired, and or about the 16th day of January, 1899, the then sheriff of said Pima County, to wit, Lyman W. Wakefield, did make, execute, acknowledge and deliver to said Wilbur H. King, the purchaser at said sale aforesaid, a deed, wherein and whereby he did attempt to convey to said King all of said property so sold; that the said deed from said sheriff was duly recorded in the recorder's office of said Pima County, on February 7, 1899.

26a. That thereafter and on or about the 24th day of April, 1907, the said Wilbur H. King did sell and convey for a valuable consideration to the defendant Joseph E. Wise, by deed duly executed and acknowledged, all of his, said Wilbur H. King's right, title and interest in and to the said Baca Float No. 3, according to the said valid description thereof, as well as all of the interest acquired by him, said King, under said sheriff's sale, aforesaid, which said deed was duly recorded in the office of the said county recorded of Santa Cruz County, in book 4 of Deeds, page 357, on May 2d, 1907.

27. That sometime prior to the 8th day of April, 1907, the said John Ireland died, leaving a widow, Mrs. A. M. Ireland; that these defendants are informed and believe that the interest acquired by said John Ireland was community property of himself and wife; that on or about said 8th day of April, 1907, the said Mrs. A. M. Ireland, widow of said John Ireland did sell and convey unto the [56] defendant Joseph E. Wise by deed dated on said day, and duly acknowledged, and recorded on May 2, 1907, in the office of the county recorder of Santa Cruz County, all of her interest in the said lands and premises aforesaid.

27a. These defendants further aver that the Superior Court of the State of Arizona, for the county of Pima, is, under the Acts of Congress and the constitution and laws of the State of Arizona, the successor of the District Court of the First Judicial

District of the Territory of Arizona in and for the county of Pima, being the court mentioned and referred to in section 26 of the answer herein; and that the said Superior Court as the successor of said District Court had and has jurisdiction in the said case of John Ireland and Wilbur H. King against David W. Bouldin, and against Leo Goldschmidt, administrator of the estate of David W. Bouldin, aforesaid, and has jurisdiction in the matter of the judgment and order of sale and in the matter of the execution of the said judgment and order of sale in said case, and in all other matters in which it is necessary that jurisdiction should be exercised therein; and these defendants further aver that the deed executed by the said Lyman W. Wakefield, as sheriff as aforesaid, was defective in divers and sundry of its recitals and in other particulars, and that it became necessary that a new and correct deed be executed by the sheriff of said Pima County, in lieu and in place thereof, and in order to correct the defects of said deed aforesaid; that on or about the 30th day of September, 1914, the said Joseph E. Wise did file his petition with the said Superior Court of the State of Arizona, aforesaid, wherein he did set forth the fact that he was the successor in [57] interest of the said Wilbur H. King of the property sold by the said sheriff, R. N. Leatherwood, under the order of said court, as aforesaid, and did set forth that the said property was duly sold by the said R. N. Leatherwood, the then sheriff of said Pima County, as aforesaid, on the 31st day of July, 1895, to the said Wilbur H. King, and that sheriff's certificate of sale was

duly issued to said King, and that no redemption from said sale has been made, and that thereafter and on or about the 16th day of January, 1889, the said Lyman W. Wakefield, the then sheriff of said county of Pima, did execute and deliver to said Wilbur H. King, what purported to be a sheriff's deed upon said sale, which said deed was defective in divers and sundry particulars, in said petition set forth, and did set forth various other matters and things and did pray for the order of said court authorizing and directing John Nelson, who then was the duly elected, qualified and acting sheriff of said Pima County, to execute, acknowledge and deliver to said Joseph E. Wise, a proper deed, conveying to him, as the grantee and successor in interest of said King, all of the right, title and interest in the said property aforesaid, levied upon and attached, foreclosed and sold under said order and judgment of said court, as aforesaid; that thereafter, and on the 1st day of October, 1914, the said Superior Court, aforesaid, did make and enter its order in the said case, aforesaid, wherein and whereby it did find the said matters and facts to be as hereinabove alleged in regard to said matter, and did authorize and direct the said John Nelson, the then sheriff of said Pima County, to execute, acknowledge and deliver to the said defendant, Joseph E. Wise, his deed, as such sheriff, conveying to the said [58] Joseph E. Wise all of the property and all of the right, title and interest in and to the said property, aforesaid, so sold by the said R. N. Leatherwood, sheriff as aforesaid, under the said judgment and order of sale of the said District Court, aforesaid; a copy of which said order of the said Court is hereto annexed and marked Defendant Wise exhibit "A," and is made a part hereof; that thereafter, and on the 5th day of October, 1914, the said John Nelson, the then sheriff of said county of Pima, did, in accordance with the said order of said Court, and also by reason of the fact that this defendant is the grantee and successor in interest of said Wilbur H. King, as aforesaid, and was entitled to a deed, as such successor in interest to the property so sold under the said judgment and order of sale, aforesaid, make, execute, acknowledge and deliver unto this defendant, Joseph E. Wise, his deed, wherein he, the said sheriff, did grant, bargain, sell and convey unto defendant Joseph E. Wise, as the grantee and successor in interest of the said Wilbur H. King, all of the right, title and interest of the said David W. Bouldin, as the same existed on the 14th day of March, 1893, and all the right, title and interest which said David W. Bouldin had on said 14th day of March, 1893, in and to the said Baca Float No. 3, now situate in the county of Santa Cruz, State of Arizona, and heretofore situate in the county of Pima, Territory of Arizona, and specifically described according to the 1863 location thereof, and as described in section 2 of the bill of complaint herein; and that said defendant has caused said deed to be duly recorded in the office of the county recorder of said Santa Cruz County, State of Arizona. [59]

28. These defendants further aver that said Joseph E. Wise was an innocent purchaser for a val-

uable consideration and without notice of any agreement or alleged agreement between the said David W. Bouldin and the said John Ireland and Wilbur H. King, or any of them, wherein and whereby the said Ireland and King agreed to rescind the transaction in which the deed executed by said Bouldin to said Ireland and King on or about February 21, 1885, and referred to in paragraph 21 of the complaint was given, and the said defendant Joseph E. Wise had no notice or knowledge of any of the matters or things alleged in said complaint, by virtue of which the said David W. Bouldin or anyone claiming under him would have right whatsoever to rescind the transaction in which said Bouldin gave him said deed to said Ireland and King, or would give said Bouldin, or anyone claiming under him the right to rescind the said deed; and in this behalf these defendants further aver that more than 20 years have elapsed since the said alleged cause of action for the rescission of said deed or of said agreement or of said transaction between the said David W. Bouldin and the said John Ireland and Wilbur H. King arose, it it ever did arise, and that this suit or any other suit to rescind said agreement or of said deed of said transaction is barred by the statute of limitations of the said State of Arizona; and that these plaintiffs and all persons under whom they claim title have been guilty of such laches as to bar them from any relief whatsoever in the said matter, and that they are now barred and estopped from asserting or claiming any such relief. And these defendants further aver that under and by virtue of the judgment rendered by the District Court of the [60] Territory of Arizona, in and for Pima County, aforesaid, in the said suit and action of John Ireland and Wilbur H. King against David W. Bouldin, aforesaid, these plaintiffs, and all other persons claiming under the said David W. Bouldin, are estopped from questioning any matters or things decided by the said judgment aforesaid, and particularly any of the matters or things pertaining to the recission of the transaction wherein or whereby the said David W. Bouldin did execute his deed to said John Ireland and Wilbur H. King, or as to any defense which the said David W. Bouldin, or his said administrator might have had to the said action aforesaid.

These defendants further aver that the deed which was executed by David W. Bouldin and his wife on or about October 16, 1888, and referred to in paragraph 15 of the complaint herein and being executed to David W. Bouldin, Jr., and Powhatan W. Bouldin, did not convey or pretend to convey any part of the said Baca Float according to said valid location; and as described in paragraph 2 of the complaint; but did convey and pretend to convey the piece of land described and hereinbefore referred to as the 1866 location. And they further aver that the deed executed by said David W. Bouldin to Powhatan W. Bouldin and James E. Bouldin, of date August 23, 1892, and mentioned and referred to in paragraph 17 of said complaint did not convey or purport to convey any other land or premises than the land described in said invalid location of 1866 aforesaid; therefore that at the time of his death

said Bouldin was the owner of all of the said undivided ½3 interest in said lands, according to the valid location thereof, except the undivided 1/9 interest of his said [61] ½3 interest which he conveyed before he died to John Ireland and Wilbur H. King as herinbefore fully alleged and set forth, and that the said Wilbur H. King under and by virtue of the sheriff's deed executed to him as aforesaid, did at the date of fsaid deed become the owner of all of the interest in said property which the said David W. Bouldin had at the date of the levy of said writ of attachment, aforesaid, to wit, March 14, 1893.

30. Defendant Joseph E. Wise further avers that upon the execution and delivery to him of the said deeds by the said Wilbur H. King and said Mrs. A. M. Ireland, and upon the recording thereof, to wit, on or about the 2d day of May, 1907, he did enter into the adverse and peaceable possession of the said Baca Float No. 3, claiming all of the right, title and interest thereto which was conveyed to him by said deeds aforesaid, and being an undivided 2/3 interest therein, and that ever since the said 2d day of May, 1907, he has been in the peaceable and adverse possession thereof, claiming title under the said deeds aforesaid, which were duly recorded as aforesaid, as against any person whatsoever except as against the undivided 1/3 interest in said lands and premises which the said heirs aforesaid of said John S. Watts did not convey to said David W. Bouldin, and except as against any and all persons who were the grantees or successors in interest of the said heirs of John S. Watts in and to the said undivided ½ interest in said land and premises, which were so retained by said heirs of John S. Watts under the deed executed by them to said David W. Bouldin.

- These defendants further aver from the creation by Act of Congress of the Territory of Arizona, [62] up to the 15th day of March, 1899, the lands and premises mentioned and described in plaintiff's complaint and all thereof and all of the property in dispute in this action was situate within the limits of the county of Pima; that on the 15th day of March, 1899, the legislative assembly of the Territory of Arizona, did enact an act entitled "An Act to create the county of Santa Cruz," which said act was approved on the 15th day of March, 1899, and became a law on said day, and that under and by virtue of the said act, aforesaid, the county of Santa Cruz was created out of the Southern part of said Pima County, and that the said Baca Float No. 3 and all the lands in dispute in this action and mentioned and described in the complaint herein, and in this Answer, did become situate within the limits of said county of Santa Cruz on the 15th day of March, 1899, and thereafter and are now situate within the limits of said county of Santa Cruz.
- 32. Defendants further aver that the deed or pretended deed or other instrument in writing, which the plaintiffs in their complaint allege was executed on the 3d day of August, 1899, by Alex F. Mathews and S. A. M. Syme, to Arizona Copper Estate, an alleged corporation, was not recorded and never has been recorded in the said county of Santa Cruz; and they further aver that the deed or mortgage or other in-

strument in writing which said plaintiffs in their complaint allege was executed by said Arizona Copper Estate to the said Alex F. Mathews and S. A. M. Syme, either individually or as trustees, a copy of which is annexed to plaintiff's complaint and marked exhibit "D," never was recorded in the said county of Santa Cruz, and is not of record in said county; defendants further [63] aver that defendant Joseph E. Wise, at the time that he purchased the interest of said Wilbur H. King and of said Mrs. A. M. Ireland and at the time that the irrespective deeds were executed and delivered to him, and at the time that the same were recored by him, as aforesaid, did not have any knowledge or notice of the execution of the said deed from Alex F. Mathews and S. A. M. Syme to the Arizona Copper Estate, and did not have any knowledge or notice of the execution of said deed or deed of trust or mortgage, aforesaid, executed by said Arizona Copper Estate to said Alex. F. Mathews and S. A. M. Syme, and had no notice or knowledge of any of the matters or things set forth or alleged in paragraph 24 of plaintiff's complaint; and they aver that the said defendant, Joseph E. Wise, was an innocent purchaser for a valuable consideration and without notice of either of said deeds or instruments in writing or of said matters or things aforesaid, and therefore, that said deed and the said trust deed or mortgage is each invalid and void as to the said defendant Joseph E. Wise.

33. And defendant Joseph E. Wise further avers that he has been in the peaceable and adverse pos-

session of the said lands and premises aforesaid, using and enjoying the same and paying all taxes that were lawfully levied against the same, claiming under the said deeds aforesaid, duly recorded as aforesaid, for a period of more than five years prior to the commencement of this action, and that this action, as against his claim, right and title to an undivided 2/3 interest in and to the said Baca Float No. 3, according to the valid location thereof, is barred by the provisions of section 697 of the Revised Statutes of the State of Arizona, of 1913, and is further barred by the provisions of [64] section 695 and also is barred by the provisions of section 696 of the said Revised Statutes of the State of Arizona; and he further avers that he has been in such peaceable and adverse possession under color of title for more than five years prior to the commencement of this suit.

34. These defendants further aver that plaintiff's cause of action to have the deed dated January 8, 1870, from John S. Watts to Christopher E. Hawley and as described and referred to in paragraph 6 of the complaint herein, reformed in any particular is barred by the provisions of section 710 and also by the provisions of Sec. 716, and also by the provisions of Sec. 718 of the said Revised Statutes of the State of Arizona. Further answering each and every allegation in the bill with reference to the instrument executed by John S. Watts in favor of Christopher E. Hawley, copy of which is attached as exhibit "A" to the bill, this defendant avers that no attachment, demand, or request in the form of proceedings at law or in equity, or otherwise, was ever made, begun,

or instituted by said Christopher E. Hawley, or any person or persons claiming by, from, through or under him, to have said instrument reformed or corrected in any way, but that more than forty years have passed since said instrument was executed and delivered, and that said Christopher E. Hawley and all persons claiming by, from, through, or under him, including the plaintiffs, have been guilty of gross laches in not seeking to reform or correct said instrument, in case it did not express the true meaning of the parties, and that any attempt to do so is now barred by every statute or rule of limitation of the State of Arizona, or of the former territory of Arizona, or of the [65] United States of America; and this defendant avers that he is informed and verily believes that said Christopher E. Hawley, and all persons claiming by, from, through or under him, never contended or believed that said instrument covered anything except the interest of said John S. Watts in that Baca Float No. 3, known as the attempted amended location of 1866, until the rejection of said location in 1899.

- 35. Defendants further aver that each and all of the causes of action alleged or attempted to be alleged or set forth in plaintiff's complaint are barred by the Statute of Limitations of the State of Arizona.
- 36. The defendant, Joseph E. Wise, further avers that for eighteen years prior to his obtaining his deeds from the said Wilbur H. King and Mrs. A. M. Ireland, and at the time that he obtained the first of said deeds, he had been continuously to wit, from

the year 1889 down to the time he obtained the first of said deeds, in peaceable and adverse possession of the following tracts of land, situate within the limits of the said Baca Float No. 3, according to the valid location thereof, to wit: The east half $(\frac{1}{2})$ of the northwest one-fourth $(\frac{1}{4})$ and the west half $(\frac{1}{2})$ of the northeast one-fourth (1/4) and the west half $(\frac{1}{2})$ of the northwest one-fourth $(\frac{1}{4})$ of section 35, township 22 S., of Range 13 E., G. & S. R. B. & M., and containing 340 acres; also Sec. 36 in the said township 22 S., of R. 13 E., containing 640 acres, cultivating, using and enjoying the same during all of said times; and at the time that he obtained his said deeds from said Ireland and King, aforesaid, he claimed to be the owner of said lands and premises aforesaid, under and by virtue of his adverse possession; and that said adverse possession had ripened [66] into a title under the statute of limitations of the then Territory, now State of Arizona, at the time he acquired his said deeds from said Ireland and King, and that ever since said date he has claimed and does now claim to be the sole owner of all of the said tracts of land, herein just above described; and he further avers that plaintiff's action or cause of action for the tracts of land aforesaid, is barred by the statute of limitations.

And the defendant Lucia J. Wise does allege that she is a daughter of Mary E. Sykes; that said Mary E. Sykes died on or about the 11th day of May, 1911; that the said Mary E. Sykes, at the date of her death, was in possession and for a continuous period of more than 10 years prior to her death, had been in the

peaceable and adverse possession of the following tract of land, situate within the limits of the said Baca Float No. 3, and within the limits of the lands claimed by plaintiffs, to wit: The northwest quarter $(\frac{1}{4})$ of the northwest quarter $(\frac{1}{4})$ of section one (1), township twenty-three (23) south, of range thirteen (13) east, Gila and Salt River Base and Meridian, cultivating, using and enjoying the same; and that this defendant, Lucia J. Wise, as one of the heirs of the said Mary E. Sykes, and as executrix of the will of said Mary E. Sykes, and as successor in interest to the said Mary E. Sykes, ever since the death of the said Mary E. Sykes, as aforesaid, has been in the peaceable and adverse possession of the said tract of land just above described, cultivating, using and enjoying the same; and that the plaintiffs cause of action as against the defendant Lucia J. Wise, as to the said tract of land just described is barred by the Statute of Limitations of the State of Arizona, and [67] is barred by the provisions of section 698 of the Revised Statutes of Arizona of 1913.

37. These defendants deny that the plaintiffs, or either of them are in the possession of said lands.

WHEREFORE these defendants pray judgment against the plaintiffs and each of them.

- 1. That the plaintiffs and each of them have and take nothing by this action and that all relief be denied to them.
- 2. That the defendant Joseph E. Wise be decreed to be the owner of an undivided $\frac{2}{3}$ interest plus an undivided $\frac{1}{18}$ interest in and to the said Baca Float

- No. 3, bounded and described as follows: Commencing at a point one mile and a half from the base of the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point, west twelve miles, thirty-six chains and forty-four links; thence south twelve miles thirty-six chains and forty-four links; thence east twelve miles, thirty-six chains and forty-four links; and thence north twelve miles, thirty-six chains and forty-four links to the place of beginning, in the county of Santa Cruz, State of Arizona, and according to the official survey of said Baca Float No. 3, as approved and adopted by the Government of the United States.
- 3. That the defendant Joseph E. Wise be decreed to be the owner of all the following pieces of land situate within the limits of said Baca Float No. 3 aforesaid, to wit: The east half of the northwest quarter, the west half of the northeast quarter, and the west half of the northwest [68] quarter of section thirty-five and all of section thirty-six in township twenty-two south, of Range 13 East, G. & S. R. B. & M., and that his title thereto be quieted.
- 4. That the defendant Lucia J. Wise be decreed to be the owner of all of the following tract of land situate within the limits of said Baca Float No. 3, to wit: The northwest quarter of the northwest quarter of section one, township 23 south, of Range 13 East, G. & S. R. B. & M.
- 5. That these defendants may have such other, further and general relief as the circumstances of the

case require and as may be meet and equitable and do recover their costs.

SELIM M. FRANKLIN,

Attorney and Solicitor for Defendants, Joseph E. Wise and Lucia J. Wise.

Verified January 21, 1915.

Exhibit "A" being included in Defendants Wises Exhibit 19.

Amended Answer of Defendants Bouldin.

Filed March 26, 1915.

To the Honorable, the Judge of the District Court of the United States in and for the District of Arizona:

The answer of James E. Bouldin and Jennie N. Bouldin, defendants to the bill of complaint and answer of David W. Bouldin and Helen Lee Bouldin, infants under the age of twenty-one years, by their guardian ad litem, Edwin F. Jones, of Tucson, Arizona.

These defendants, saving and reserving unto themselves the benefit of all exceptions to the errors and imperfections in said bill contained, for answer to so much thereof [69] as they are advised it is necessary or material for them to answer unto, do aver and say that:

- 1. They admit the allegations of paragraph one of the bill of complaint.
- 2. They admit the allegations of paragraph two of the bill of complaint.
- 3. They admit the allegations of paragraph three of the bill of complaint.

- 4. They admit the allegations of paragraph four of the bill of complaint.
- 5. They admit the allegations of paragraph five of the bill of complaint, except that they say, that certain persons who were heirs of Luis Maria Baca did execute and deliver to David W. Bouldin certain quitclaim deeds, a copy of one of which is attached to the bill of complaint marked exhibit "B" and by reference made a part thereof. They say that these persons were heirs of Luis Maria Baca and these deeds conveyed to David W. Bouldin whatever interest remained in these heirs, if there was any; after the deeds from the heirs of Baca on May 1, 1864, to John S. Watts, and on May 30, 1871, to John S. Watts mentioned in paragraph five and eleven of the bill of complaint.
- They admit that on or about January 8, 1870. John S. Watts, by his deed duly executed and acknowledged, conveyed to Christopher E. Hawley, Baca Float No. 3, but they say that the said deed described in paragraph six of the bill of complaint was not filed for record until May 9, 1885; that the said John S. Watts died sometime prior to the 30th day of September, 1884; that David W. Bouldin, without notice actual or constructive, of the said [70] deed of January 8, 1870, purchased, for a valuable consideration, a two-thirds undivided interest in Baca Float No. 3, as it is described in paragraph two of the bill of complaint, from the heirs of the said John S. Watts, and said heirs did make, execute, and deliver to said David W. Bouldin their good and sufficient deed, bearing date of September 30, 1884, con-

veying to the said David W. Bouldin, an undivided two-thirds interest in said property, and the same was thereafter recorded in the office of the county recorder of Pima County, Arizona.

- 7. They admit the allegations of paragraph seven of the bill of complaint.
- 8. They admit the allegations of paragraph eight of the bill of complaint, except that they say, that if John S. Watts did not convey Baca Float No. 3, as it is described in paragraph two of the bill of complaint, by his deed to Christopher E. Hawley, dated January 8, 1870, then certain persons who were all his heirs did, as alleged in paragraph 6 of this answer, convey a two-thirds undivided interest in Baca Float No. 3, as it is described in paragraph two of the bill of complaint, to David W. Bouldin by deed dated September 30, 1884, a copy of which is attached to the complaint in this cause marked exhibit "C" and by reference made a part thereof.
- 9. They neither admit or deny the allegations of paragraph nine of the bill of complaint, so far as the same relate to the construction of the deed of January 8, 1870, but say that if the construction put upon the said deed dated January 8, 1870, from John S. Watts to Christopher E. Hawley by the allegations of paragraphs eight and nine of the bill of complaint is not the correct one, then [71] the deed from the heirs of John S. Watts to David W. Bouldin dated September 30, 1884, is a valid and binding conveyance of an undivided two-thirds interest in Baca Float #3, as it is described in paragraph two of the bill of complaint. And they further say that even if

such construction is correct that the deed of September 30, 1884, to David W. Bouldin, was as hereinbefore alleged, a conveyance to an innocent purchaser for value without notice; and that it was executed and delivered before the deed of January 8, 1870, from John S. Watts to Christopher E. Hawley was recorded, and that for that reason it is superior to the deed of January 8, 1870, from John S. Watts to Christopher E. Hawley. They further say that they have no information or knowledge sufficient to form a belief as to the existence of the title bond mentioned in said paragraph nine, and therefore deny each and every allegation in that behalf in said complaint contained.

- 10. They admit the allegations of paragraph ten of the bill of complaint.
- They admit the allegations of paragraph 11. eleven of the bill of complaint, except that they say, that if the deed of May 30, 1871, from the heirs of Luis Maria Baca to John S. Watts did not inure to the benefit of Christopher E. Hawley and did not cure any defect that might have existed from the manner in which the deed to John S. Watts of May 1, 1864, was executed on behalf of some of the heirs of Luis Maria Baca, then the deeds from the heirs of Luis Maria Baca to David W. Bouldin mentioned in paragraphs five and twelve of this answer conveved whatever interest remained in these heirs after the said deed of May 30, 1871, to David W. Bouldin. And they further say that if the deed [72] from the heirs of Baca to John S. Watts dated May 30, 1871, did not inure to the benefit of Christopher E. Hawley,

then the deed of September 30, 1884, from the heirs of John S. Watts to David W. Bouldin conveyed to David W. Bouldin an undivided two-thirds of whatever interest was conveyed by the deed of May 30, 1871, from the heirs of Baca to John S. Watts.

12. They admit the allegations of paragraph twelve of the bill of complaint, except as hereinafter denied, and except that they say that certain persons who were the heirs of Luis Maria Baca, did execute to David W. Bouldin, certain quitclaim deeds, one of which is attached to the bill of complaint, marked exhibit "B," and by reference made a part thereof. and they say that these persons were heirs of Luis Maria Baca, and that said deeds conveyed whatever interest remained in them after the deeds from the heirs of Baca, dated May 1, 1864, and May 30, 1871, to John S. Watts, mentioned in paragraphs five and eleven of the bill of complaint; and they further say that the persons who executed the deed dated September 30, 1884, from the heirs of John S. Watts to David W. Bouldin, were all the heirs of said John S. Watts, and that said deed conveyed from them to David W. Bouldin an undivided two-thirds of whatever interest was in them at that time in Baca Float No. 3, as it is described in paragraph two of the bill of complaint. They deny that David W. Bouldin did not perform the agreements which were made on his part as the same are set forth in said deeds from the heirs of Baca to David W. Bouldin and from the heirs of John S. Watts to David W. Bouldin, and they further say that any promises or agreements made by the said [73] Bouldin to the said heirs of

Baca, or to the heirs of John S. Watts, do not inure to the benefit of these plaintiffs, and should it be held that said promises did so inure to the benefit of these plaintiffs, then defendants plead that plaintiffs have been and are guilty of gross laches. And they further say that the deed of September 30, 1884, from the heirs of John S. Watts to David W. Bouldin, is superior to the deed of January 8, 1870, from said John S. Watts to Christopher E. Hawley, for the reason that the deed from John S. Watts to Hawley was not filed for record until May 9, 1885, while the deed from the heirs of said Watts to David W. Bouldin was executed and delivered on September 30, 1884, and prior to the recordation of the deed from Watts to Hawley, and that David W. Bouldin was an innocent purchaser for value, without notice.

13. They admit that on or about June 8, 1885, John C. Robinson entered into an agreement with David W. Bouldin, but deny that the said agreement was impossible of performance in its inception and at all times, or was void, and deny that David W. Bouldin never became entitled to half or any interest under the said agreement and in any land whatever. They further admit that prior to June 8, 1885, John C. Robinson had become the owner of whatever title was conveyed to the land described in paragraph two of the bill of complaint by deed of January 8, 1870, from John S. Watts to Christopher E. Hawley, except in so far as David W. Bouldin acquired title to the said land by the deeds of January 14, 1878, from certain of the heirs of Luis Maria Baca to David W. Bouldin and the deed of September 30, 1884, from

the heirs of John S. Watts to David W. Bouldin.

- [74] October 6, 1887, David W. Bouldin executed an instrument in the form of a mortgage whereby he mortgaged to W. G. Rifenburg, 12,500 acres in the northwest quarter of Baca Float No. 3, according to the survey of said Float by George J. Roskruge, County Surveyor of Pima County, Arizona, in September, 1887, to secure a promissory note for \$5,000.00, payable in twelve months thereafter at one per cent per month interest and five per cent attorney's fees. They further allege on information and belief that if this mortgage was executed it has been paid, or otherwise settled and discharged.
- 15. They admit the allegations of paragraph fifteen of the bill of complaint.
- 16. They admit the allegations of paragraph sixteen of the bill of complaint, except that they deny that this instrument was made on the sole consideration of the agreement of June 8, 1885. They deny that it was made under a mutual mistake of fact, and is, therefore, void; and deny that it was without consideration and therefore void; but they say that it was a valid and subsisting conveyance of an undivided half of whatever interest John C. Robinson had in Baca Float No. 3, as it is described in paragraph 2 of the bill of complaint. . . . A copy of the said instrument is attached to this answer marked exhibit "M" and by reference made a part hereof.
- 17. They admit the allegations of paragraph seventeen of the bill of complaint, except that they

say, that the deed of August 23, 1892, from David W. Bouldin to Powhatan W. Bouldin and James E. Bouldin further described the tract of land conveyed thereby as: "Being known as location #3 of the Baca Series." A copy of the deed dated [75] August 23, 1892, from David W. Bouldin to Powhatan W. Bouldin and James E. Bouldin is attached to this answer marked exhibit "N" and by reference made a part hereof.

- 18. They admit that on or about November 19, 1892, John C. Robinson executed the deed described in paragraph eighteen of the bill of complaint; but they deny that the said instrument was invalid for any reason whatever, and say that it was a valid convevance and that it did convey to Powhatan W. Bouldin and James E. Bouldin all the interest which John C. Robinson had in the north half of Baca Float #3, as it is described in paragraph two of the bill of complaint. They further say that this instrument cannot be attacked at this late day by these plaintiffs, because of their gross laches and delay. They further say that these plaintiffs cannot attack this deed for the reason that John C. Robinson was the proper party to attack it, if it be attacked at all And for the further reason that the land conveyed by his deed has since been conveyed to a bona fide purchaser for value without notice. A copy of the deed dated November 19, 1892, from John C. Robinson to Powhatan W. Bouldin and James E. Bouldin is attached to this answer, marked exhibit "O" and by reference made a part hereof.
 - 19. They admit the allegations of paragraph nine-

teen of the bill of complaint.

- 20. They have not sufficient information upon which to form a belief as to whether John C. Robinson gave to S. A. M. Syme the power of attorney described in paragraph twenty of the bill of complaint, and therefore they deny each and every allegation contained in said paragraph.
- 21. They admit that on or about February 21, 1885, David W. Bouldin executed an instrument in the form of a [76] deed whereby he undertook to convey to John Ireland and Wilbur H. King, the undivided one-third of one-third of all right, title and interest owned and possessed by the said David W. Bouldin in the land described in paragraph two of the bill of complaint; but deny that at that time David W. Bouldin had no right, title, or interest in the said land. They admit that priod to May 2, 1895, David W. Bouldin and John Ireland and Wilbur H. King agreed to rescind the transaction in which the said deed was given and admit that David W. Bouldin gave to John Ireland and Wilbur H. King his note for the money which had been paid him by the said Ireland and King, and that the said Ireland and King gave the said Bouldin a bond to reconvey the said land to him. They admit that this note was not paid when due but deny that on May 2d, 1895, any valid judgment was rendered by the District Court for the First Judicial District of the Territory of Arizona, on said note in favor of the said Ireland and King, and against Leo Goldschmidt, as administrator of the estate of the said David W. Bouldin, deceased, foreclosing the attachment lien described in the said

attempted judgment. They further deny that under and on any valid execution issued on said judgment, the sheriff of Pima County sold and conveyed to the said Wilbur H. King all the right, title and interest of Leo Goldschmidt, as such administrator in and to the lands described in paragraph 2 of the bill of complaint, on July 31st, 1895. They further say that whatever interest David W. Bouldin, Sr., took or had in the premises described in paragraph 2 of the bill of complaint, was taken and held in trust by the said David W. Bouldin, Sr., for his sons, and that John Ireland and Wilbur H. King at all times had notice of said trust and that said Wilbur H. King particularly had notice of said trust on and prior to the 31st [77] day of July, 1895. They further say that the District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, was wholly without jurisdiction to render the judgment on May 2d, 1895, against Leo Goldschmidt, as administrator of the estate of David W. Bouldin, foreclosing any attachment lien against the property of the said David W. Bouldin, for the reason that the plaintiffs in said suit did not in their complaint, or in any amendment thereto, waive recourse against any other property of the estate of the said David W. Bouldin, deceased, as required by the statutes of the then Territory of Arizona, in such cases made and provided.

They further say that on or about July 5th, 1895, the sheriff of Pima County did attempt to levy upon and seize whatever interest David W. Bouldin had on that date in certain lands, and that the said sheriff

did advertise for sale, thereafter, the interest of Leo Goldschmidt as administrator of the estate of David W. Bouldin, in and to said lands, and whatever interest David W. Bouldin had at the time of his death. They further say that on or about July 31st, 1895, the said sheriff did attempt to sell whatever interest Leo Goldschmidt, as administrator of the estate of David W. Bouldin, had in the said lands on that date, which was nothing, and on January 16th, 1899, the sheriff of Pima County did attempt to convey to Wilbur H. King, the purchaser at such sale, whatever interest Leo Goldschmidt, as administrator of the estate of David W. Bouldin, had in the said lands on July 31st, 1895, or at any time thereafter, which interest was nothing. [78]

They admit that on or about April 8, 1907, the widow of John Ireland executed the quitclaim deed described in paragraph twenty-one of the bill of complaint to Joseph E. Wise, and that on or about April 24, 1907, Wilbur H. King executed the quitclaim deed described in paragraph twenty-one of the bill of complaint; but say that these deeds conveyed nothing for the reason that by the title bond which John Ireland and Wilbur H. King gave to David W. Bouldin they held whatever interest they took under the deed of February 21, 1885, from David W. Bouldin to them in trust for the said David W. Bouldin.

- 22. They admit the allegations of paragraph twenty-two of the bill of complaint.
- 23. They admit the allegations of paragraph twenty-three of the bill of complaint, except that they say, that if any title to Baca Float No. 3, as it is de-

scribed in paragraph two of the bill of complaint, remained in the heirs of John S. Watts after the deed of John S. Watts to Christopher E. Hawley dated January 8, 1870, then certain persons who were all the heirs of John S. Watts conveyed an undivided two-thirds interest in Baca Float No. 3, as it is described in paragraph two of the bill of complaint, to David W. Bouldin by deed dated September 30, 1884.

- 23-a. They admit the allegations of paragraph twenty-three-a of the bill of complaint.
- 24. They have no knowledge of the allegations of paragraph twenty-four of the bill of complaint, as the same is amended, except that they deny that prior to August 3, 1899, Alex. F. Mathews and S. A. M. Syme by mesne conveyances had become the owners of the land conveyed by John S. Watts to Christopher E. Hawley, by the deed, exhibit "A," referred [79] to in paragraph six of the bill of complaint; but say that at that time and since November 12, 1892, Powhatan W. Bouldin and James E. Bouldin, and their grantees and assignees were and had been the owners of whatever title was conveyed by John S. Watts to Christopher E. Hawley by the deed, exhibit "A," to the north half of the said land.
- 25. They have no knowledge of the allegations of paragraph twenty-five of the bill of complaint.
- 26. They have no knowledge of the allegations of paragraph twenty-six of the bill of complaint, except that they deny that S. A. M. Syme, and the heirs, devisees and legal representatives of Alex F. Mathews sold and conveyed the land conveyed by the deed from Watts to Hawley referred to in paragraph

six of the bill of complaint to the plaintiffs; but say that at that time and since November 12, 1892, Powhatan W. Bouldin and James E. Bouldin, and their assignees and grantees, have been and are the owners of the north half of the said land, and they deny that these plaintiffs have been since February 8, 1907, and are now, the owners of the north half of the said land.

- 27. These defendants pray leave upon the hearing to refer to the originals or copies of the various deeds, agreements or other instruments in this answer mentioned, described or referred to as the same may be produced upon said hearing for a more detailed, particular and accurate description thereof, and for proof of the allegations in reference thereto.
- 28. They deny that the plaintiffs are in possession of the said land.
- 29. Further answering the said complaint, these defendants aver that on or about the 14th day of January, 1878, [80] the following persons, to wit, Maria Estapana Gorduna, Jesus Maria Baca, Inez Baca, Nepomuceno Baca, Manuel Baca, Juan Baca, Rafael Parado, Dolores de Parado, Jesus M. Baca, Miguel Baca, Nepomuceno Baca, Apolonia Baca de Adamson, Jacinto Barreyesa, and Palencia Baca, being heirs and descendants of heirs of said Luis Maria Baca, did, by deeds duly executed and acknowledged, and thereafter and on the 25th day of March, 1885, duly recorded in the county of Pima, State of Arizona, convey unto David W. Bouldin an undivided two-thirds of all their right, title and interest in and to said Baca Float No. 3, as the same

is described in paragraph two of the bill of complaint, and that under and by virtue of said deeds, the said David W. Bouldin became the owner of a very large interest in and to said Baca Float No. 3.

30. That the said John S. Watts mentioned in the complaint, to whom was executed and delivered by the heirs of Luis Maria Baca the various deeds mentioned in the complaint as having been executed and delivered to him, died some time prior to the 30th day of September, 1884, leaving as his heirs John Watts, J. Howe Watts, Elizabeth Watts, Fannie A. Bancroft, Mary A. Wardwell, Louise Wardwell, A. L. Bancroft and Atwater Wardwell; that on the 30th day of September, 1884, the said heirs aforesaid of the said John S. Watts, being the sole owners as such heirs of all interest in the said Baca Float No. 3 aforesaid, which was in John S. Watts at the time of his death, did, for a valuable consideration execute and deliver to David W. Bouldin their deed dated on that day, wherein they granted, sold, and conveyed unto the said David W. Bouldin an undivided two-thirds interest in and to said lands and premises. And [81] these defendants further aver that the deed which plaintiffs allege in their complaint was executed by the said John S. Watts to Christapher E. Hawley on or about January 8, 1870, was not filed for record until the 9th day of May, 1885; that the said David W. Bouldin at the time he purchased the said premises from the said heirs of the said Watts was without notice of the said deed from the said Watts to the said Hawley, and was therefore an innocent purchaser for value,

and the said deed of the said Watts to the said Hawley was of no force or effect against the right, title and interest which the said Bouldin acquired under and by virtue of his said deed dated September 30, 1884.

- 31. And these defendants further aver that on June 28, 1892, and on November 19, 1892, one John C. Robinson, having acquired such title to said premises as was conveyed by said John S. Watts to Christopher E. Hawley by the deed dated January 8, 1870, mentioned in the complaint, for a valuable consideration sold and conveyed to Powhatan W. Bouldin and James E. Bouldin the north half of Baca Float No. 3, it being the intention of the said Robinson and of the grantees in said deeds, that said deeds should convey, and they did convey the north half of said Baca Float No. 3 as it finally was approved by the proper officers of the United States, as the same is described in paragraph two of the complaint.
- 32. That by reason of certain mesne conveyances the title to the said north half of said premises is now vested in these defendants.

WHEREFORE, these defendants pray judgment against the plaintiffs, and each of them,

- (1) That the plaintiffs, and each of them, take nothing [82] by this action, and that all relief be denied to them;
- (2) That these defendants be decreed to be the owners of the north half of Baca Float No. 3;
- (3) That these defendants have such other, further and general relief as the circumstances of the case require, and as may be meet and equitable, and

that they have their costs.

WELDOM M. BAILEY, JOHN H. CAMPBELL,

Solicitors for the Defendants James E. Bouldin, Jennie N. Bouldin, David W. Bouldin and Helen Bouldin.

EDWIN F. JONES,

Guardian ad Litem for the Infant Defendants, David W. Bouldin and Helen Bouldin.

Duly verified.

Exhibit "M" was conveyance and agreement between Robinson and P. W. and J. E. Bouldin by David W. Bouldin, as attorney in fact, dated June 28, 1892.

Exhibit "N" was deed from David W. Bouldin to P. W. and J. E. Bouldin dated August 23, 1892.

Exhibit "O" being same as Defendant Wise's Exhibit #38.

Answer of Jesse H. and Margaret W. Wise.

Filed October 3, 1914.

To the Honorable, the Judge of the District Court of the United States, in and for the District of Arizona, and to the Honorable District Court of the United States, in and for the District of Arizona:

Come now the defendants, Margaret W. Wise and Jesse H. Wise, and for answer to the bill of complaint of the plaintiffs herein, do make the following reply and defense [83] thereto:

1. That not having sufficient knowledge or information to form a belief, these defendants deny that all the heirs of Luis Maria Baca sold or conveyed

the said Baca Float No. 3 to said John S. Watts, as alleged in paragraph 5 in said complaint, but upon information and belief allege that some of said heirs or descendants of said heirs conveyed their interest therein to David W. Bouldin, and also to Joseph E. Wise, Jesse H. Wise and Margaret W. Wise.

- 2. They deny that on or about January 8, 1870, or at all John S. Watts sold or conveyed the said Baca Float No. 3, to one, Christopher E. Hawley as alleged in paragraph 6 of said complaint, or that any such deed was acknowledged or recorded; but they aver that they are informed and believe that on or about said January 8, 1870, the said John S. Watts did execute and deliver to said Christopher E. Hawley a quitclaim deed whereby he released and quitclaimed unto the said Christopher E. Hawley a copy of which is marked exhibit "A" and attached to plaintiff's bill of complaint and they deny that said deed conveyed to said Hawley said land as embraced in Baca Float No. 3. They allege that in said quitclaim deed the land is so imperfectly described that the deed is void and of no force and effect.
- 3. The defendants deny that John S. Watts applied to the Commissioner of the General Land Office for leave to amend the description of said Baca Float No. 3, under the belief that the change is simply an amendment of the location as made June 17, 1863, and these defendants deny that all parties interested, including the land office believe that the Baca Float No. 3 was described by the bounds or [84] the so-called amended location of 1886, as alleged in paragraph 7 in said complaint.

- These defendants deny that the said John S. Watts intended to convey by the said quitclaim deed of January 8, 1870, exhibit "A," Baca Float No. 3, as the same is described in paragraph 2 of the said bill and they deny that John S. Watts conveyed to Christopher E. Hawley by said quitclaim deed the Baca Float No. 3 as described in paragraph 2 of said bill; they deny that the description by metes and bounds the said deed of January 8, 1870, exhibit "A," to bill was executed under the mistake and belief existing at the time said deed was made, as to the metes and bounds of the said Float as alleged in paragraph 8 of the bill. The defendants deny that the various descendants who made deeds to Joseph E. Wise and Jesse H. Wise failed to convey any right, title or interest to the land in question.
- 5. That the defendants claim title under the following conveyances:
- (a) Deed from Ciria Salazar to Joseph E. Wise and Jesse H. Wise dated August 8, 1913; recorded September 15, 1913; Deed Book 7, page 369.
- (b) Juan a. L. Baca, widow of Jose Baca, and others to Marcos C. de Baca, dated August 20. 1913; recorded August 29, 1913, Deed Book 7, page 344.
- (c) Marcos C. de Baca to Joseph E. Wise and Jesse H. Wise, deed dated August 20, 1913; recorded August 29, 1913; Deed Book 7, page 352.
- (d) Jesse H. Wise to Margaret W. Wise deed dated August 28, 1913; recorded August 30, 1913; Deed Book 7, page 354.
- (e) Vidal N. de Mares, widow of Inez Mares, et al., to Marcos C. de Baca, deed dated August 30, 1913;

recorded [85] September 2, 1913; Deed Book 7, page 365.

- (f) Teefela Baca, daughter of Jose Baca, deceased, and Felix Baca, her husband, to Marcos C. de Baca, deed dated August 20, 1913; recorded August 29, 1913; Deed Book 7, page 348.
- (g) Guadalupe Mares de Sandoval et al., to Marcos C. de Baca, deed dated August 27, 1913; recorded September 15, 1913; Deed Book 7, page 363.
- 6. Defendants deny that the interest of plaintiffs in the said lands and premises, described in paragraph 2 of the complaint herein is upwards of \$100,000 or is of any value whatsoever; denying that the plaintiffs have any interest whatsoever except as trustees, under the said trust deed or mortgage, exhibit "D," aforesaid; and deny that the said interest is of the value of upwards of \$100,000 or is of any value whatosoever; for the reason that the notes to secure which, said trust deed or mortgage was executed are barred by the statute of limitation. Defendants further deny that plaintiffs, or either of them are entitled to possession of said land or to a part or portion thereof.
- 7. The defendants deny that plaintiffs are in possession of Baca Float No. 3 or any part thereof and allege and say that they the defendants together with their codefendants Joseph E. Wise and Lucia J. Wise, his wife, are in possession of a very large part of said Baca Float No. 3.
- 8. These defendants further allege that the deed from John S. Watts to Christopher E. Hawley of January 8, 1870, being exhibit "A" in plaintiff's bill

released and quitclaimed according to location of 1866 which is not a true [86] location of Baca Float No. 3, and therefore the said Hawley did not acquire any interest in Baca Float No. 3 except a very small strip on the northeastern corner thereof, if he, Hawley, acquired anything at all.

- 9. These defendants further aver that the John S. Watts deed to Hawley dated January 8, 1870, was not recorded until the 9th day of May, 1885, which was about ten months after the deed from the heirs of John S. Watts to David W. Bouldin; that the said David W. Bouldin was an innocent purchaser for a valuable consideration and without notice of the said deed from John S. Watts to Hawley, and therefore, in any event the said deed is invalid and of no effect as against the right of David W. Bouldin acquired under his deed dated September 30, 1884,
- 10. The defendants claim title from the Government to the heirs of Luis Maria Baca and then by deed from the heirs of Luis Maria Baca recited aforesaid in paragraph 5 of this answer.
- 11. The defendants deny each and every allegation of the plaintiffs set forth in their bill that is not herein admitted.

Wherefore, these defendants pray judgment against the plaintiffs and each of them:

- 1. That the plaintiffs and each of them have and take nothing by this action, and that all relief be denied to them.
- 2. That the defendant Margaret W. Wise be decreed to be the owner of undivided 1/25 interest in and to the said Baca Float No. 3, bounded and de-

scribed as follows: Commencing at a point one mile and a half from the base of the Salero Mountains in a direction north 45 degrees, [87] east of the highest point of said mountain; running thence from said beginning point west 12 miles 36 chains and 44 links; thence south 12 miles, 36 chains, and 44 links; and thence north 12 miles, 36 chains and 44 links; to the place of beginning, in the county of Santa Cruz, State of Arizona.

3. That these defendants may have such other, further and general relief as the circumstances in the case require and as may be meet and equitable and do recover their costs.

JAMES R. DUNSEATH,

Attorneys and Solicitors for Defendants Jesse H. Wise and Margaret W. Wise.
Verified September, 1914.

Answer of Interveners, M. I. Carpenter, Pat C. Ireland, Ireland Graves, Anna R. Wilcox and Eldridge I. Hurt.

Filed March 26, 1915.

(Pursuant to stipulation signed by all the parties.)
To the Honorable, the Judge of the District Court of
the United States, in and for the District of
Arizona;

Comes now, M. I. Carpenter, Pat C. Ireland, Ireland Graves, Anna R. Wilcox and Eldridge I Hurt, defendants by intervention, and for answer to the bill of complaint of the plaintiffs herein, do make the following reply and defense thereto.

1. They admit the allegations of paragraph one (1) of the bill of complaint.

- 2. They admit the allegations of paragraph two (2) of the bill of complaint. [88]
- 3. They admit the allegations of paragraph three (3) of the bill of complaint.
- 4. They admit the allegations of paragraph four (4) of the bill of complaint.
- 5. Answering paragraph five (5) of the said bill of complaint, they deny that on or about May 1st, 1864, all of the heirs of Luis Maria Baca, sold and conveyed Baca Float No. 3, to John S. Watts by deed duly executed and acknowledged as alleged in said bill. They admit that some of the heirs of Luis Maria Baca did execute and convey on or about May 1, 1864, their quitclaim deed wherein they did remise, release and quitclaim unto the said John S. Watts, their respective interest in and to the said Baca Float No. 3, according to the description of said Float set forth in section two (2) of said bill; but these defendants aver that certain other heirs of the said Luis Maria Baca owning a large part of the said Baca Float No. 3, did not execute and did not sign or acknowledge the said deed, and they allege that under and by virtue of the said deed, the said John S. Watts only acquired a part interest in and to the said Baca Float No. 3.
- 6. They deny that on or about January 8, 1870, or at all, that the said John S. Watts sold or conveyed the said Baca Float No. 3, to Christopher E. Hawley as alleged in paragraph six (6) of said bill, or that any such deed was duly executed or acknowledged or recorded; but they aver that they are informed and believe that on or about said January 8,

1870, the said John S. Watts did execute and deliver to said Christopher E. Hawley a deed of quitclaim wherein he did remise, release and quitclaim unto said Christopher E. Hawley, the certain property therein [89] described, a copy of which deed is marked exhibit "A" and attached to plaintiff's bill of complaint, and they admit that said deed of quitclaim was duly acknowledged and recorded as alleged in said complaint; and they further deny that said deed did convey to said Hawley said Baca Float No. 3, but allege that the same did remise, release and quitclaim to said Hawley, only whatever interest the said Watts may then have had in that certain and specific piece of land which is specifically described, in said deed.

7. Answering paragraph seven (7) of said bill, these defendants deny that John S. Watts applied for leave to amend the description under the belief that it was simply an amendment of the selection and location as made on June 17, 1863, but on the contrary, these defendants aver that said location of 1866 was intended as a new or relocation of the location of June 17, 1863; and they deny that between May 21, 1866, until July 25, 1899, or at any time between said periods, all or any of the parties interested, except those claiming under the deed to Hawley as aforesaid, believed or contended that Baca Float No. 3 was described only by the metes and bounds of the so-called amended location of 1866, and they deny that the actual metes and bounds of said location of 1863, or of said location of 1866, had not been determined prior to July 25, 1899, but on the contrary, they aver that said locations had been noted by the officials of the Land Department on its records and maps and were known to the parties claiming under the deed to Hawley, as aforesaid, for a long time prior thereto. They allege that said Hawley, or his grantees, repeatedly and continuously from 1870 to June, 1899, applied to the Land Department of the United States [90] with full knowledge of said 1863 location, for a confirmation of said location of 1866 as described in the said deed to Hawley.

- 8. Answering paragraph eight (8) of said bill, these defendants deny that said John S. Watts intended to convey to Christopher E. Hawley by the deed of January 8, 1870, exhibit "A," Baca Float No. 3, as the same is described in paragraph 2 of said bill of complaint; and they deny that said John S. Watts did convey to said Christopher E. Hawley by said deed of January 8, 1870, aforesaid, the said Baca Float No. 3, as described in paragraph 2 of said bill of complaint; they deny that the description by metes and bounds in said deed of January 8, 1870, exhibit "A," to plaintiffs' complaint was executed under the mistaken belief existing at the time said deed was made, as to the metes or bounds of the said Float, as alleged in paragraph 8 of said complaint, or at all.
- 9. Answering paragraph nine (9) of said bill, these defendants deny that the correct construction to be put on the said deed of January 8, 1870, exhibit "A," is supported by any of the facts alleged in paragraph 9 of said complaint; and not having

sufficient information to form a belief, these defendants deny that the said John S. Watts on or about March 2, 1863, or at all, executed or delivered to one William Wrightson, as alleged in paragraph 9 of said complaint, or at all, a title bond for said Baca Float No. 3, or that prior to January 8, 1870, the said Christopher E. Hawley did become entitled to or was in possession of said title bond, or was entitled thereunder to have a fee simple title to said Baca Float No. 3, as described in paragraph 2 of said complaint, made to him; and these [91] plaintiffs, as successors in title to said Hawley, or at all, now own or possess said title bond, and further these defendants say that if the construction as claimed in said bill, be the proper construction for the said deed of January 8, 1870, from John S. Watts to Christopher E. Hawley, then that the said deed was not filed for record until May 9, 1885; that the said John S. Watts died some time prior to the 30th day of September, 1884; that David W. Bouldin, without notice, actual or constructive of the said deed of January 8, 1870, purchased for a valuable consideration, a two-thirds undivided interest in Baca Float No. 3, as it is described in paragraph two of the bill of complaint, from the heirs of the said John S. Watts, and said heirs did make, execute and deliver to said David W. Bouldin their good and sufficient deed, bearing date of September 30, 1884, conveying to the said David W. Bouldin, an undivided two-thirds interest in said property, and the same was thereafter recorded in the office of the county recorder of Pima County, Arizona.

10. Answering paragraph ten (10) of said bill. these defendants admit that on or about January 13, 1870, the said Christopher E. Hawley made a declaration of trust in which he stated that he held certain lands as trustee for James Eldredge and Charles D. Poston, and aver that the lands he so referred to were the lands described in the said deed from John S. Watts to Christopher E. Hawley, of date January 8, 1870, exhibit "A," aforesaid.

These defendants not having sufficient information to form a belief and not knowing what the terms of the said trust were, deny that the interest of said Charles D. Poston, in the lands referred to in said declaration of trust, [92] depended on a contingency which never occurred, as alleged in paragraph 10 of said complaint or at all, and deny that consequently, or at all, said interest never attached to said land, or that the said Charles D. Poston made no claim to have any interest in said land.

11. Answering paragraph eleven (11) of said bill of complaint and the amendments thereto of the plaintiffs herein, these defendants admit that on or about May 30, 1871, all of the heirs of Luis Maria Baca, except, however, those particular heirs who thereafter conveyed their interest in said Baca Float No. 3, to David W. Bouldin, as hereinafter in this answer set forth, did execute a deed to the said John S. Watts wherein they did convey to said Watts all their interest in the said Baca Float No. 3, according to the 1863 location thereof; but these defendants deny that any of the heirs ratified or confirmed the title made by them or any of them or

by their attorney Tomas Cabeza de Baca to John S. Watts, as alleged in said bill of complaint, or at all; these defendants admit that these particular heirs of said Luis Maria Baca who signed, executed and acknowledged in their own proper name the said deed of date the 1st day of May, 1864, and referred to in section 5 of the bill of complaint herein, did ratify and confirm the said deed of May 1, 1864; but they deny that any of the other heirs of said Luis Maria Baca, or that any of the heirs who did not duly sign, execute and acknowledge the said deed of May 1, 1864, did ratify or confirm the said alleged deed of 1864; and these defendants admit that all of the heirs of said Luis Maria Baca, except those heirs who thereafter conveyed their interest to said David W. Bouldin, as hereinafter set forth, did, by the said deed [93] of date May 30, 1871, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in and to said Baca Float No. 3, and being the property described in said deed of May, 1864. These defendants deny that the said deed of May 30, 1871, being the deed mentioned in section 11 of the bill, inured to the benefit of the said Christopher E. Hawley and deny that it cured any defect that might have existed or did exist from the manner in which the deed to John S. Watts of May 1, 1864, was signed or executed or acknowledged, on behalf of some or any of the heirs of Luis Maria Baca, or at all; and these defendants further deny the allegations as set forth in the amendment of plaintiffs to the said section 11 of their bill, that the persons who executed,

the said deed of May 1, 1864, were all the heirs of said Luis Maria Baca and they deny that all the heirs of said Luis Maria Baca executed, or pretended to execute, said deed; and they deny that all the persons executing the deed aforesaid, of date May 30, 1871, were all the heirs of said Luis Maria Baca; but they allege that there were other heirs of said Luis Maria Baca who did not execute, or pretend to execute, the said deed.

These defendants further aver that they are informed and believe and therefore allege the fact to be that the said deed of date May 30, 1871, has not been recorded in the county of Pima, State of Arizona; defendants further aver that the deeds executed by certain of the heirs of said Luis Maria Baca to David W. Bouldin, as hereinafter set forth, were duly recorded in the county of Pima, when the said lands in dispute were situate in said county; that the said David W. Bouldin was an innocent purchaser for [94] a valuable consideration, of all of the interest conveyed to him under the said deeds aforesaid, and hereinafter set forth; that by reason thereof the said deed to said John S. Watts of date May 30, 1871, is null and void as against the prior recorded deed executed by certain heirs of said Luis Maria Baca to said David W. Bouldin, as hereinafter set forth, and the said deeds to David W. Bouldin take precedence over the said deed to John S. Watts of date May 30, 1871.

12. Answering paragraph twelve (12) of said bill, these defendants deny that, by the title bond referred to in the said complaint, all or any of the

heirs of Luis Maria Baca, or of John S. Watts, held the title, if any remained in them, in view of the deeds of May 1, 1864, and May 30, 1871, and of January 8, 1870, referred to in said bill of complaint, in trust for the said Christopher E. Hawley, or his successors in title, or of the said plaintiffs, as alleged in paragraph twelve of said complaint, or at all. And these defendants, not having sufficient information to form a belief, deny that said David W. Bouldin did not in any manner or to any extent perform the agreements on his part as alleged in paragraph 12 of said complaint, or at all.

- 13. Answering paragraph thirteen (13) of said bill, these defendants aver that they are without knowledge, information or belief as to all or any of the matters stated in said paragraph.
- 14. Answering paragraph fourteen (14) of said bill, these defendants deny that at the time the said David W. Bouldin attempted to make, or did make, the mortgage mentioned and referred to in paragraph 14 of said complaint, [95] he, the said David W. Bouldin, had no other or better title than was conveyed to him by the instruments particularly described in paragraphs 12 and 13 of said complaint; but allege that the said David W. Bouldin did have other title at said time than the title which was conveyed to him by the said instruments particularly described in paragraphs 12 and 13 of said complaint.
- 15. Answering paragraph fifteen (15) of said bill, these defendants deny that at the time said David W. Bouldin made, or attempted to make, the

deed or instrument in the form of a deed, mentioned and referred to in said paragraph 15, the said David W. Bouldin had no other or better title than was conveyed to him by the instrument particularly described in the paragraphs marked "12" and "13" of said bill, or either thereof; but these defendants allege that David W. Bouldin had other title which was conveyed to him by other deeds than those mentioned in the said paragraphs 12 and 13.

- 16. Answering the paragraph sixteen (16) of said bill, these defendants admit that the agreement mentioned therein was recorded as alleged; but that they are without knowledge, information and belief as to any of the other matters stated in said paragraph.
- 17. Answering paragraph seventeen (17) of said bill, these defendants deny that at the time the said David W. Bouldin made the deed mentioned in paragraph 17 of the complaint herein, that the said David W. Bouldin had no other or better title to the lands sought to be conveyed than was conveyed to him by the instrument described in paragraphs 12, 13 and 16 of said complaint. [96]
- 18. Answering paragraph eighteen (18) of said bill, these defendants admit that the deed mentioned therein was recorded as alleged; but aver that they are without knowledge, information and belief as to any of the other matters stated in said paragraph.
- 19. Answering paragraph nineteen (19) of said bill, these defendants aver that they are without any knowledge, information and belief as to any and all of the matters stated in said paragraph.

- 20. Answering paragraph twenty (20) of said bill, these defendants aver that they are without any knowledge, information and belief as to any and all of the matters stated in said paragraph.
- 21. Answering paragraph twenty-one (21) of said bill, these defendants aver that the instrument in the form of a deed which, in paragraph 21 of said complaint, plaintiffs allege was, on or about February 21, 1885, executed by the said David W. Bouldin, was, in fact a deed, and that the same was duly executed and was duly recorded, and that the same was a good deed of conveyance and did convey to the said grantees therein named, to wit: To John Ireland and Wilbur H. King, all of the right, title and interest and all the property which it did purport to convey; and these defendants deny that at that time, the said David W. Bouldin had no right or title or interest in or to any part of said land. Defendants deny that prior to May 2, 1895, or at any other time, the said David W. Bouldin and John Ireland and Wilbur H. King, or any of them, agreed to rescind the transaction in which said deed was given; and not having sufficient information to form a belief, these defendants deny that David W. Bouldin gave the said John Ireland and Wilbur H. King, or either of them, his note for [97] the money which had been paid by the said Ireland and King and that the said Ireland and King gave the said Bouldin a bond to reconvey said land to him. These defendants admit that a judgment was obtained by said Ireland and Kings, or one of them, against Leo Goldschmidt, as administrator of the estate of the said David W.

Bouldin, deceased, on or about May 2, 1895, said judgment being rendered and entered by the District Court of the First Judicial District of the Territory of Arizona, in and for Pima County, and that an execution or order of sale was issued under said judgment and that the sheriff of said Pima County sold and conveyed to said Wilbur H. King all the right, title and interest which said David W. Bouldin, or his estate had in and to the lands described in paragraph 2 of the complaint herein on July 31, 1895; but they deny that said interest was nothing. These defendants admit that on or about April 8, 1907, the widow of John Ireland did execute a deed conveying to defendant Joseph E. Wise, all of her right, title and interest in and to said Baca Float No. 3, and that on or about April 24, 1907, the said Wilbur H. King did execute to defendant Joseph E. Wise, his deed wherein he did convey to the defendant, all his right, title and interest in and to said Baca Float No. 3, as described in paragraph 2 of the complaint. But defendants deny that for the reasons stated in the said complaint of plaintiffs, and deny that for any reasons whatsoever, the said deeds just mentioned, or either of them, conveyed no little to any portion of said land, or conveyed no interest therein to said defendant Joseph E. Wise.

- 22. Answering paragraph twenty-two (22) of said bill these defendants aver that they are without any knowledge, [98] information and belief as to any and all of the matters stated in said paragraph.
 - 23. Answering paragraph twenty-three (23) of

said bill, these defendants admit the recording of the deed as therein alleged; but aver that they are without any knowledge, information and belief as to any of the other matters stated in said paragraph.

23a. They admit the allegations of paragraph twenty-three-a, (23a) of said bill.

- 24. Answering paragraph twenty-four (24) of said bill, these defendants deny that prior to August 3, 1899, or ever or at all, the said Alex F. Mathews and S. A. M. Syme, by mesne conveyance, had become the owners of the land conveyed by John S. Watts to Christopher E. Hawley by the deed marked exhibit "A." These defendants admit that the deeds which appear of record, as alleged in said paragraph 24, do appear of record, and these defendants aver that they are without knowledge, information or belief as to all or any of the other allegations set forth in said paragraph 24 of said Bill as amended.
- 25. Answering paragraph twenty-five (25) of said bill, these defendants aver that they are without knowledge, information and belief as to all or any of the matters stated therein.
- 26. Answering paragraph twenty-six (26) of said bill, these defendants admit that on or about February 8, 1907, the said Samuel A. M. Syme, and certain persons claiming to be the heirs, devisees and legal representatives of Alex F. Mathews, executed to the plaintiffs as trustees for the grantors, or as the attorneys in fact for the grantors, a certain instrument in writing which was thereafter [99] recorded in Santa Cruz County, Arizona, in book 7

of Real Estate, at page 546, but these defendants are without knowledge, information or belief as to whether or not said persons, were, in fact, the heirs, devisees and legal representatives of said Alex F. Mathews and they deny that said instrument was, in fact, a deed, or conveyed any estate in any property to the plaintiffs or either of them, and these defendants further deny that since February 8, 1907, or at any time, the plaintiffs or either of them, have been or are now, the owners of said Baca Float No. 3, located on June 17, 1863, or any part thereof.

- Further answering said complaint these defendants allege that on or about the 14th day of January, 1878, the following persons, to wit: Rafael Parado, Dolores Baca de Parado, Jesus M. Baca, Miguel Baca, Nepomuceno Baca, Apolonia Baca de Adamson, Jacinto Barreyesa, Palencio Baca, Francisco Baca, Maria Estapana Gorduna, Jesus Maria Baca, Ines Baca, Nepomuceno Baca, Manuel Baca and Juan Baca, being heirs and descendants of heirs of said Luis Maria Baca, did, by deeds duly executed, acknowledged and thereafter and on the 25th day of March, 1885, duly recorded in the said county of Pima, State of Arizona, convey unto said David W. Bouldin, an undivided two-thirds of all their right, title and interest in and to said Baca Float No. 3, as described in said first and valid description thereof, and that under and by virtue of said deeds the said David W. Bouldin became the owner of a very large interest in and to said Baca Float No. 3.
- 28. That the said John S. Watts to whom was executed and delivered by the heirs of Luis Maria

Baca, the various deeds alleged in the complaint and herein mentioned and referred [100] to, died on or about June 11, 1876, leaving surviving him, his wife, Elizabeth A. Watts, and five children, to wit: John Watts, a son, J. Howe Watts, a son, Mary A. Watts, a daughter, who subsequently married W. V. B. Wardwell, Louise Watts, a daughter, who subsequently married Atwater Wardwell and Frances A. Watts, a daughter, who subsequently married A. L. Bancroft; that at the time of the death of the said John S. Watts, he was the owner of all of the interest theretofore acquired by him in and to the said Baca Float No. 3, as described in paragraph 2 of said complaint, he never having conveyed the same; that thereafter and on or about the 20th day of September, 1884, the said widow and heirs aforesaid, of the said John S. Watts, being then the owners of all the interest which the said John S. Watts had theretofore owned in the said Baca Float No. 3, aforesaid, and being the interest acquired by said John S. Watts in his lifetime, under the deeds executed by certain heirs of the said Louise Maria Baca, as aforesaid, did, for a valuable consideration, execute and deliver to one David W. Bouldin their deed, dated on said day, wherein and whereby they did grant, sell and convey unto said David W. Bouldin, an undivided two-thirds interest in and to said lands and premises aforesaid, describing the same with the specific boundaries of said valid location, and as described in paragraph 2 of said complaint; that said deed was signed and delivered in the presence of two witnesses and thereafter and on the 29th day of

March, 1885, the same was recorded in the office of the county recorder of said Pima County, in the then Territory of Arizona, in book 13 of Deeds of Real Estate at pages 13 et seg. thereof; that thereafter and on the 14th day of April, [101] 1888, the execution of said deed was duly acknowledged before Frank P. Clark, clerk of the County Court of El Paso County, State of Texas, being a court of record having a seal, and thereafter on the 18th day of April, 1888, the said deed was again recorded in the office of the said county recorder of said Pima County, in book 14, of Deeds of Real Estate, at pages 597 et seg thereof.

And these defendants further aver that the deed which plaintiffs allege in their complaint was executed by the said John S. Watts to Christopher E. Hawley, on or about the 8th day of January, 1870, was not recorded in the said county of Pima, or in any other county in the Territory of Arizona, until the 9th day of May, 1885, being nearly seven months after the heirs of said John S. Watts had executed and delivered their deed aforesaid to said David W. Bouldin; and these defendants aver upon information and belief that the said David W. Bouldin was an innocent purchaser for a valuable consideration without notice of the said deed from the said John S. Watts to said Christopher E. Hawley, and therefore, in any event, the said deed is invalid and of no force or effect as against the right, title and interest which said David W. Bouldin acquired under and by virtue of his deed aforesaid, of date September 30, 1884.

- 29. That thereafter and on or about the 21st day of February, 1885, the said David W. Bouldin did, by deed dated on said day, convey to John Ireland and Wilbur H. King, an undivided 1/9 of his, said Bouldin's interest, in and to said Baca Float No. 3, describing the same according to the said first and valid location thereof, which deed was duly acknowledge, delivered and was thereafter and on the 19th day of June, 1885, recorded in the office of the said county recorder of said Pima County, in book 13, Deeds of Real Estate, page 140. [102]
- 30. That by reason of the aforementioned conveyance from David W. Bouldin to John Ireland and Wilbur H. King, the said John Ireland did become the owner of and entitled to an undivided 1/18 of all of the said David W. Bouldin's right, title and interest in and to the said Baca Float No. 3; the said interest of Bouldin's being at that time, an undivided ½ interest in and to all of the said Baca Float No. 3; that the said property was acquired by the said John Ireland as community property.
- 31. That thereafter, the said John Ireland died intestate, leaving surviving him as his devisees and heirs, Mrs. M. I. Carpenter, a daughter, Pat C. Ireland, a grandson and son by adoption, Ireland Graves, a grandson by deceased daughter, Anna R. Wilcox and Eldridge I. Hart, grandchildren by a deceased daughter. That as such devisees and heirs of John Ireland, these defendants are the owners of and entitled to an undivided ¼ of 1/9 of ½ of the said Baca Float No. 3.

WHEREFORE these defendants and interveners pray that they may have judgment against the said

plaintiffs and each of them and all other parties to this action.

- 1. That the defendants, M. I. Carpenter, Pat C. Ireland, Ireland Graves, Anna R. Wilcox and Eldridge I. Hurt, be decreed to be the owners of an undivided \(\frac{1}{4}\) of \(1/9\) of \(\frac{2}{3}\) interest in and to the said Baca Float No. 3, as described in paragraph 2 of said plaintiff's bill of complaint.
- 2. That they be decreed to own the said interest in the following proportions: M. I. Carpenter, an undivided one-fourth; Pat C. Ireland, an undivided one-fourth; Ireland Graves, an undivided one-fourth and Anna R. Wilcox and Eldridge I. Hurt, each an undivided one-eighth. [103]
- 3. That these defendants and interveners have such other, further and general relief as the circumstances of the case require and as may be meet and equitable and that they have their costs.

JOHN D. MACKAY,

Attorney and Solicitor for M. I. Carpenter, Pat C. Ireland, Ireland Graves, Anna R. Wilcox and Eldridge I. Hurt, Defendants and Interveners. Verified March 25, 1915.

Stipulation to Use Parts of Record in Case in Washington, D. C.

(Filed February 17, 1915.)

IT IS HEREBY STIPULATED THAT:

1. Any party herein may treat as properly exemplified and authenticated and in proper form for admission in evidence herein, with the same force and effect as if duly exemplified and authenticated under the laws of the United States relating thereto,

any instrument purporting to be (a) a map or any copy thereof; (b) or any communication, letter, report or decision by any officer or official of the United States; (c) or any petition, letter or communication to any officer, official or department of the United States appearing in the transcript of record in the case of Franklin K. Lane, et al., appellants, against Cornelius C. Watts, et al., No. 2584 October term, 1913, in the Court of Appeals of the District of Columbia, or in the transcript of record in the same case, No. 889, October Term, 1913, in the Supreme Court of the United States, as having been offered in evidence in said case.

- 2. Subject to any proper objection as to revelancy, materiality or competency in other respects, any such paper appearing in either of said printed transcripts of record may be offered in evidence herein on production of [104] a copy of such paper vouched by the solicitor for the party offering it, to be a correct copy of the paper appearing in either of said printed transcripts.
- 3. The authenticity of any printed copy of said transcripts of record may be shown or proved by the signature or testimony of any of the solicitors or counsel herein.

Stipulation that Answers be Treated as Cross-bills. (Filed January 8, 1915.)

IT IS HEREBY MUTUALLY STIPULATED, that the pleadings by way of answer of each and every defendant herein, heretofore or hereafter duly served upon the solicitors for the plaintiffs, or upon the solicitors for the defendants affected thereby,

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shall be taken, not only as a pleading by way of answer, but also as a cross-bill, duly filed, served, controverted and at issue, asking affirmative relief [105] against the plaintiffs and against each and every other defendant in the action.

It is stipulated by the several parties to this proceeding that each and every paper was duly served by each of said parties upon each of the other parties or upon the solicitor or solicitors of such other parties.

It is further stipulated by the several parties to this proceeding that the paragraph numbers in the several pleadings amended by the pleadings hereinbefore printed, have been preserved in the amended pleadings. [106]

In the District Court of the United States for the District of Arizona.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr.,

Plaintiffs,

VS.

SANTA CRUZ DEVELOPMENT COMPANY et al.,

Defendants.

Petition for Temporary Injunction.

To the Honorable, the Judge of the District Court of the United States, in and for the District of Arizona;

Your petitioner, Dabney C. T. Davis, Jr., respectfully shows that he is one of the plaintiffs named in the above-entitled suit:

That the bill of complaint in said suit was filed in the clerk's office of this court on the 23d day of June, 1914, and that a subpoena was issued out of and under the seal of this court on the 24th day of June, 1914, addressed to the several defendants above named, including the defendants Joseph E. Wise and Lucia J. Wise;

That the said suit is brought to quiet the title to the land situated in Santa Cruz County, State of Arizona, known as Baca Float No. 3, and which is particularly described in the bill of complaint in this suit, to which for such particular description, reference is hereby made.

That the said Joseph E. Wise, and upon information and belief, his nephew, George Wise, the son of the defendant Margaret W. Wise acting as their agent and representative, have threatened to build a fence around the said Float, and to enclose the same with said fence; that said defendants Wise have actually commenced the erection and construction of said fence and are unlawfully attempting to enclose said lands or a large portion thereof, with said fence, and [107] are unlawfully attempting to enclose the said lands or a large portion thereof, with said fence, and unlawfully attempting to deprive the plaintiffs of the possession of said lands or a large portion thereof; and that said acts on the part of the defendants Wise are without any authority of the plaintiffs and against plaintiffs' will and without their consent; that the defendants Wise will, unless restrained by the order of this Court, continue to build and construct such fence until such fence is completed entirely around said lands, or a large portion thereof, and that the building of said fence by defendants Wise, and the enclosing of said lands and premises by said fence will change the existing condition of the property involved in this suit to the prejudice and disadvantage of the plaintiffs, and prevent the plaintiffs from securing the full benefit of the decision of this Court should the same be in their favor, and disturb the status quo existing at the time of the institution of this suit and now existing.

That unless the said defendants Wise are restrained by order of this Court from the commission of the acts herein complained of, they will continue to erect and construct the said fence and will thus change the *status quo* existing at the institution of this suit and now existing to the great wrong and injustice of the plaintiffs and to the prejudice of the plaintiffs in this suit and contrary to and in violation of the rights of the plaintiffs.

That the plaintiffs have no plain, speedy and adequate remedy or any remedy at law, and are remedyless, except by order of this Court, and that an order to show cause why the defendants Wise their agent, attorneys and representatives, should not be restrained from continuing or completing the building of said fence, or otherwise changing the status quo of said property, be granted plaintiffs, returnable on Monday, the 29th day of June, 1914, at 10 o'clock in the forenoon of said day or as soon thereafter as counsel may be heard.

DABNEY C. T. DAVIS, Jr. [108]

State of Arizona,
County of Pima,—ss.

Dabney C. T. Davis, Jr., being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing petition, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those matters he believes the same to be true.

D. C. T. DAVIS, Jr.

Subscribed and sworn to before me this 24th day of June, 1914.

[Notarial Seal]

RENA NORTON,
Notary Public.

My commission expires February 7, 1914. Filed June 26, 1914. [109]

In the District Court of the United States in and for the District of Arizona.

CORNELIUS C. WATTS and DABNEY C. T. DA-VIS, JR.,

Plaintiffs,

VS.

SANTA CRUZ DEVELOPMENT COMPANY, et al.,

Defendants.

Order [to Show Cause].

On reading and filing the verified petition of Dabney C. T. Davis, Jr., hereto attached and the bill of

complaint filed in the above-entitled suit;

IT IS ORDERED That the defendant Joseph E. Wise and that George Wise, the son and representative of the defendants Margaret W. Wise and Jesse H. Wise, show cause before me at the courtroom of the United States District Court, in the city of Tucson, county of Pima, State of Arizona, on Monday, June 29th, A. D., 1914, at the hour of 10 o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard, why an order should not be issued restraining them and each of them, their, and each of their agents, attorneys and representatives, from interfering in any manner with the status quo of the property described in the complaint herein as the 1863 location of Baca Float No. 3, and particularly from continuing or completing the building of fences in or around said Float, or any portion thereof, pending further order of this Court.

Dated at Tucson, Pima County, Arizona, this 24th day of June, 1914.

WM. H. SAWTELLE,

Judge of the United States District Court. [110]

In the District Court of the United States in and for the District of Arizona.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR.,

Plaintiffs,

VS.

SANTA CRUZ DEVELOPMENT COMPANY, et al.,

Defendants.

Affidavit and Reply of Joseph E. Wise to Petition for Writ of Injunction.

To the Honorable the Judge of the District Court of the United States, in and for the District of Arizona.

Now comes Joseph E. Wise, one of the defendants herein, and for answer to the petition filed herein by plaintiffs, or on their behalf, for a writ of injunction herein, and in answer to the order of the Honorable Judge of this court of date the 24th day of June, 1914, to show cause why an order should not be issued restraining this defendant, Joseph E. Wise and George Wise from interfering in any manner with the status quo of the property described in the complaint herein, as the 1863 location, or Baca Float No. 3, and particularly from continuing or completing the building of fences in or around said Float, or any portion thereof, pending the further order of this Court, respectfully shows and alleges that he is the owner of a large undivided interest in and to said Baca Float No. 3 and has been the owner of such interest for many years last past; that he is advised and believes that his interest is in excess of an undivided onetenth interest; that the plaintiffs in this case are not the sole owners of the said Baca Float No. 3, that all of the interest of the heirs of Luis Maria Baca in said Baca Float No. 3, was not conveyed to John S. Watts, as alleged in the bill of complaint [111] of plaintiffs herein; that the said alleged deed did not convey to the said John S. Watts all of the interest of said heirs, but, if the same conveyed anything, only conveyed, as this defendant is informed and believes, the interest of a very small number of said heirs in said Baca Float No. 3:

This defendant further alleges that he became the owner of an interest in said Baca Float No. 3 in the year 1907, that thereafter and in September, 1913, he did acquire other and additional interests in said Baca Float No. 3, from some of the heirs and descendants of said Luis Maria Baca; that in the year 1907 and ever since, this defendant has been in the business of raising cattle, and has, as one of the co-owners of said Baca Float No. 3, grazed his cattle upon said Float, and still is doing so; that, for the purpose of so grazing his cattle, he has erected at a large expense, a number of fences upon said Float; and has also erected a number of fences so as to keep the cattle of persons who have no interest in said Float from off said grant; but this defendant denies that he, or his nephew George Wise, either as agent for Margaret W. Wise and Jesse H. Wise, or as their representative, or at all, have threatened to build a fence around the said Float, or to enclose the same with said fence, and this defendant denies that he has had any such intention or that he has erected any fences for any other purpose, than for the purpose of protecting his cattle, in grazing upon said lands, and for keeping the cattle of others who have no right to graze upon said Float from off the same, and said fence does not enclose all of said Float. This defendant denies that he is attempting to deprive the plaintiffs of the possession of said Float, except that certain tract occupied by defendant as his homestead, which he claims under a different title.

This defendant does not know whether or not his acts are against the will or without the consent of plaintiffs, for the reason that until the filing of this bill of complaint, or less [112] than thirty days before the filing of the same, the said plaintiffs never expressed any objection to this defendant building fences on said Float for the purposes aforesaid, or for any purpose, or at all. This defendant further states that he will not and does not intend to build or construct a fence completely around said lands, and that he only intends to fence up sufficient thereof so that he can enjoy the use of said lands for grazing purposes; that he is willing that the plaintiffs pending this action, should have a like possession of all of said grazing lands, and lands enclosed within said fence, so used by him for grazing purposes, with this defendant.

Defendant further states that prior to the bringing of this action, he constructed over 30 miles of fencing on said grant for the purposes aforesaid, and that said fence increased the value of the said property for the reason that a large part thereof, and particularly that part so fenced, is only valuable for grazing purposes, and cannot be used to advantage without the same be fenced. This defendant denies that the enclosing of such parts of said land and premises by a fence will change the existing condition of the property involved in this suit, to the prejudice or disadvantage of plaintiffs, or at

all, and denies that it will be in violation of the rights of the plaintiffs, and further denies that it will prevent the plaintiffs from securing the full benefit of the decision of the Court, should it be in their favor, and denies it will disturb the status quo existing at the time of the institution of this suit, or now existing; and in this behalf defendant avers that this is a suit to quiet title, and is not a suit for possession; that the fences which this defendant has erected or may erect upon said lands cannot in any way affect any of the issues in this case; or the property involved; that this defendant does not claim any right to said Baca Float No. 3 by virtue of the statute of limitations, except a part thereof of which he had been in possession not exceeding 1040 acres, for more than ten years prior to his purchasing an interest [113] in the said Baca Float No. 3, from said heirs and which lands he still is in possession of, living thereon with his family as his homestead and homeplace, and which portion of lands he has attempted to fence, and does not intend to fence any more than the same has been fenced for many years last past; but this defendant herewith consents that said plaintiffs and all the other reputed co-owners of said Baca Float No. 3, shall during the pendency of this action, have the right to the possession, equally with this defendant, of all of said Baca Float No. 3, except however, the said homestead and homeplace of this defendant, the title to which he claims by virtue of the statute of limitations, as aforesaid, prior to his, being an owner of said grant, and

which homeplace and lands he is now living upon and has been for more than ten years and in regard to which place, he is not erecting or attempting to erect any more fences.

Ploat No. 3, is a tract of land twelve miles square; that upon said tract of land are a great many settlers who have no interest whatsoever in and to said Baca Float, except by virtue of adverse possession, if any; that said settlers have no interest whatsoever and claim no interest in the larger part of said Baca Float No. 3, and upon the part thereof where this defendant is grazing his cattle, and has erected fences for the grazing of the same, as aforesaid, and that it is necessary that said fences be kept intact and that the case be rebuilt where they have been torn down, so as to keep the cattle of said settlers who have no interest in said part of said grant from trespassing thereon.

Wise has no interest whatsoever in said grant; that the defendant, Jesse H. Wise has an undivided interest in said grant, and claims an undivided interest therein, under and by virtue of certain deed or deeds from the heirs and descendants of heirs of said Luis Maria Baca; [114] that neither said defendants Jesse H. or Margaret W. Wise, either have fenced or threatened to fence any of said Float, and he further avers that whatever the said George Wise is doing in the matter of fencing said Float the said George Wise is doing as an agent and em-

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ployee and representative of this defendant and not otherwise.

WHEREFORE, this defendant prays that said petition for writ of injunction be denied.

JOSEPH E. WISE. SELIM M. FRANKLIN, Attorney for J. E. Wise.

State of Arizona, County of Pima,—ss.

Joseph E. Wise, being first duly sworn deposes and says, that he is one of the defendants in the above-entitled case, that he has read the foregoing reply and answer to petition and order for injunction, and knows the contents thereof. That the facts therein stated are true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes the same to be true. And that the facts therein denied are not true to the best of his information and belief.

JOSEPH E. WISE.

Subscribed and sworn to before me this 29th day of June, 1914.

W. FRED KAIN,
Notary Public.

Filed June 30, 1914. [115]

In the District Court of the United States in and for the District of Arizona.

CORNELIUS C. WATTS et al.,

Plaintiffs.

VS.

SANTA CRUZ DEVELOPMENT COMPANY, et al.,

Defendants.

Supplemental Affidavit and Reply of Joseph E. Wise, to Petition for Writ of Injunction.

To the Honorable the Judge of the District Court of the United States, in and for the District of Arizona;

Comes now Joseph E. Wise, one of the defendants herein, and for supplement or amendment to his answer to the petition for an injunction herein, respectfully shows and alleges; that since the filing of his reply and answer to said petition, to wit, upon the hearing before your Honor, this defendant ascertained from the testimony of George W. Atkinson, that said Atkinson claimed a lease or license to use all of said Baca Float No. 3, for grazing purposes under a certain lease which he testified had been executed to him by plaintiffs and that said lease permitted him, the said Atkinson, not only to graze his own cattle upon said grant, but permitted him to sublet said right to any and all persons whatsoever, except these defendants; that this defendant has further been advised since the said hearing, that said alleged lease from plaintiffs to Atkinson contains

a provision that the same can be terminated at the pleasure of either party at any time during the term thereof upon such party giving the other party sixty days' notice of his desire to terminate the same; that it becomes apparent that said lease was only made for the purpose of harassing and annoying this defendant, and therefore, this defendant now states that he is not willing that the plaintiffs in this action, or either of them, should have, pending this action, possession of all or any of the grazing lands on the said Baca Float No. 3, [116] of any of said lands, and is not willing that they, or either of them, should have any possession whatsoever of any part of said Baca Float No. 3 for grazing purposes, or any other purpose whatsoever; and this defendant herewith withdraws his consent that said plaintiffs or any other reputed co-owner of said Baca Float No. 3, shall, during the pendency of this action, have the right to the possession equally with this defendant, or at all, to any part of said Baca Float No. 3, except the owners of the undivided 1/3 interest in said Baca Float who claim under the heirs of John S. Watts, deceased; and as these plaintiffs do not claim under the said heirs of said John S. Watts, this exception does not apply to plaintiffs or either of them.

This defendant further respectfully represents that the statement set forth in lines 2 to 12 of page four of his said answer and reply to said petition do not correctly express what this defendant intended to say in this, that this defendant intended to allege and set forth in said answer that he did

not claim any right to said Baca Float No. 3 by virtue of adverse possession only, that is by possession only, except the 1040 acres mentioned in said answer and reply, to which he does claim full title by virtue of adverse possession only, as set forth more fully in his answer to the complaint herein; but this defendant intended to say in said reply that he did claim his undivided interest in said grant, which interest comes directly from the heretofore owners of said grant, adversely to all other claimants of said interest, and he does claim that having been in possession of his said undivided interest under recorded deeds conveying the same to him, for more than seven years, that any action wherein his right to his said undivided interest is questioned is barred by the statute of limitations; and he asks the Court to consider that his said answer and reply to said petition is amended so as to set forth this status of claim on his part, all of which is more fully set forth in his answer to the bill of complaint of plaintiffs, which answer is now filed herein.

> JOSEPH E. WISE, SELIM M. FRANKLIN, Attorney for Joseph E. Wise. [117]

State of Arizona, County of Pima,—ss.

Joseph E. Wise, being first duly sworn, says that he is one of the defendants in the above-entitled action; that he has read the foregoing supplement and amendment to his answer and reply to petition for injunction herein, and knows the contents thereof. That the facts therein stated are true of his own

knowledge, except as to the matters stated upon information and belief, and as to those matters he believes the same to be true.

JOSEPH E. WISE.

Subscribed and sworn to before me this 9 day of July, 1914.

My commission expires Nov. 20, 1916.

W. FRED KAIN, Notary Public.

Filed July 9, 1914. [118]

At a term of the United States District Court for the District of Arizona, held in the courtroom at the city of Tucson, Arizona, the 20th day of July, 1914. Present: Hon WILLIAM H. Sawtelle, Judge.

In Equity—E-5. (TUCSON.)

CORNELIUS C. WATTS et al.,

Plaintiffs,

VS.

SANTA CRUZ DEVELOPMENT COMPANY et al.,

Defendants.

Order for Injunction.

The order to show cause heretofore granted herein, directed to the defendant Joseph E. Wise and to George Wise, as agent of the defendants Jesse H. Wise and Margaret W. Wise, commanding them to appear and show cause, if any they have, why an order should not be made enjoining them from changing the *status quo* existing at the time of said

order to show cause, on Baca Float No. 3, and from erecting or maintaining fences enclosing portions of said Float pending the decision of this suit, coming on to be heard, and after duly considering the evidence presented on both sides, and after hearing Samuel L. Kingan and Hartwell P. Heath, of counsel for plaintiffs, and Selim M. Franklin, solicitor for defendant Joseph E. Wise, and due consideration being had,

Upon the motion of Samuel L. Kingan, solicitor for plaintiffs,

IT IS ORDERED, upon the plaintiffs executing a bond to the defendant Joseph E. Wise in the sum of Five Thousand Dollars (\$5,000), conditioned that plaintiffs will pay to said defendant such costs and damages as may be incurred or suffered by said defendant, should it be adjudged and found that said defendant was wrongfully enjoined or restrained, that said Joseph E. Wise be, and hereby is, his attorneys, agents, employees and representatives during the pendency of this suit, enjoined from erecting or re-erecting fences in, upon or around Baca Float No. 3, or any portion thereof, which would prevent or obstruct the said plaintiffs, or [119] tenants from enjoining the use of said Float for grazing purposes, or which would prevent or obstruct free ingress or egress of cattle of said plaintiffs, or their tenents, to and from the water or drinking places upon said Float, or prevent or obstruct the use of said water and land, as heretofore used. And especially is the said Wise enjoined from erecting what is known as the Garden and Coyentana fences

and if so it be that said defendant has already rebuilt said last-mentioned fences since June 25, 1914, he is hereby enjoined and commanded to take away or remove such fences, or a sufficient portion or portions thereof so as to not prevent or obstruct the free access of cattle to their customary watering and grazing places. Provided, that this injunction shall not extend to the land occupied by the said Joseph E. Wise, at Calabasas, as a homestead.

Dated this 20th day of July, 1914.

WM. H. SAWTELLE,
Judge.

Filed July 20, 1914. [120]

In the District Court of the United States in and for the District of Arizona.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr.,

Plaintiffs,

VS.

SANTA CRUZ DEVELOPMENT COMPANY, JOSEPH E. WISE et al.,

Defendants.

Motion and Petition for Modification of Injunction.

To the Honorable, the Judge of the District Court of the United States, in and for the District of Arizona.

Now comes Joseph E. Wise, a defendant in the above-entitled suit, and respectfully shows: That heretofore, and on the 24th day of June, 1914, said plaintiffs filed a petition herein, wherein they did

pray that an order to show cause be issued against this defendant and to show cause why he should not be restrained from continuing or completing the building of a certain fence therein mentioned, or otherwise changing the *status quo* of the property in dispute in this action; that in said petition, the plaintiffs did allege that this defendant and others

have threatened to build a fence around the said Float (Baca Float No. 3) "and to enclose the same with said fence: that said defendants Wise have actually commenced the erection and construction of said fence and are unlawfully attempting to enclose the said lands, or a large portion thereof, with said fence, and unlawfully attempting to deprive the plaintiffs of the posession of said lands, or a large portion thereof; and that said acts on the part of said defendants Wise are without any authority of the plaintiffs, and against plaintiffs' will and without their consent; that the defendants Wise will, unless restrained by the order of this court, continue to build and construct such fence until such fence is completed entirely around said lands, or a large portion thereof, and that the building of said fence will change the existing condition of said property involved in this suit, to the prejudice and disadvantage of the plaintiffs, and prevent the plaintiffs from securing the full benefit [121] of the decision of this Court, should the same be in their favor, and disturb the status quo existing at the time of the institution of this suit, and now existing. That

unless the defendants Wise are restrained by order of this Court from the commission of the acts herein complained of, they will continue to erect and construct the said fence and will thus change the *status quo* existing at the institution of this suit, and now existing, to the great wrong and injustice of the plaintiffs, etc."

and plaintiffs did then pray: "and that an order to show cause why the defendants Wise, their agents, attorneys and representatives, should not be restrained from continuing or completing the building of said fence, or otherwise changing the *status quo* of said property, etc."

That this Honorable Court did, on the said 24th day of June, issue its order, directed to this defendant, and to one George Wise, requiring them and each of them, their, and each of their agents, attorneys and representatives, from interfering in any manner with the status quo of the property described in the complaint herein, as the 1863 location of Baca Float No. 3, and particularly from continuing or completing the building of fences in or around said Float, or any portion thereof, pending further order of this Court.

That thereafter and on the 29th day of June, 1914, this defendant did appear before this Honorable Court, in response to said order, and the said matter was heard by the Court on said day; but by reason of the fact that this defendant had not yet had time to prepare his answer to the complaint of plaintiffs, and by reason of the fact that the Hon. Judge of this court was required to leave the city of Tucson on

the afternoon of said day, this defendant did not have time or opportunity to present to the Court at said hearing, the evidence necessary for a full consideration of said petition; and particularly did not have opportunity to present a map, showing what fences he had theretofore built within the limits of the said Baca Float No. 3, and showing the watering places on said grant, and present a full defense to said application. [122]

That upon said hearing, it was agreed to submit said matter upon briefs, and this defendant agreed to file his answer, as soon as he possibly could.

That within a short time thereafter, this defendant did file his verified answer to the complaint of plaintiffs; but the said answer only touched upon the question of title to the said Baca Float No. 3, and did not present any facts whatsoever in regard to fences or watering places or trails, for the reason that the present suit is an action to quiet title, and therefore none of the facts in regard to fences or watering-places or trails etc., are matters in dispute in the main action in regard to which pleadings could be predicated. Therefore, the said answer, so filed by this defendant, did not contain and could not contain any of the facts in regard to fences which this defendant had built and maintained within the limits of said grant prior to the filing of said petition, and particularly fences which enclosed his pastures which had been built prior to the filing of said petition; and defendant has had no opportunity to present to this court the facts relative to the fences and enclosures which he had built upon said lands and had maintained upon said lands prior to the commencement of this action, and this Hon. Court was not and is not advised as to said facts.

That thereafter, and on the 20th day of July, 1914, this Hon. Court did grant an injunction, which, by its terms enjoins and restrains this defendant from doing matters and things which were not petitioned or prayed for in the said petition for an injunction of plaintiffs, and in regard to which the order of this Hon. Court did not require this defendant to present any testimony at the time of said hearing; that by said order this defendant is enjoined

from erecting or re-erecting fences in, upon or around Baca Float No. 3, or any portion thereof, which would prevent or obstruct the said plaintiffs, or their tenants, from enjoying the use of said Float for grazing purposes, or which would prevent or obstruct free ingress [123] egress to cattle of said plaintiffs their tenants, to and from the water or drinkingplaces upon said Float, or prevent or obstruct the use of said land and water, as heretofore used. And especially is the said Wise enjoined from erecting what is known as the Garden and Coventana fences and if so it be that the said defendant has already built said last-mentioned fences since June 25, 1914, he is enjoined and commanded to take away or remove said fences, or a sufficient portion or portions thereof, so as not to prevent or obstruct the free access of cattle to their customary watering and grazing places."

That said injunction goes beyond said petition for an injunction filed by plaintiffs, and beyond the order of this Court to show cause, and is indefinite and uncertain to such an extent that this defendant, who is desirous of carefully observing the orders and injunctions of this Court, does not and cannot know the scope and extent thereof; and said injunction goes further and in effect deprives this defendant of the right to use certain pasturage which he has enclosed within the limits of said grant, and were enclosed a long time before the filing of said petition.

To make the said matter clear to this Honorable Court as to the effect and scope of said injunction, defendant appends hereto a sketch map of said Baca Float No. 3, which shows the pastures he enclosed and the fences which he had erected on said grant, prior to the filing of said petition, some of which fences have been unlawfully and surreptitiously cut from time to time by parties unknown to defendant, as hereinafter set forth.

In the year 1891, or thereabouts, this defendant erected within the limits of said Baca Float No. 3 a fence enclosing three sides of the pasture, containing 800 acres, known as the Hacienda Field, as shown by the pasture marked "Hacienda Field," on the plat of Baca Float hereto annexed; said fence has remained ever since and has been used by this defendant as a pasture and the maintenance of said fence does not in any way affect the status quo of said property, as the same existed on June 24, 1914, when this suit was commenced.

In May, 1911, and thereafter, and in February, 1912, [124] being more than two years before this suit was commenced, this defendant claiming to be an owner of an undivided interest in said Baca Float, did enclose another pasture, containing 5,000 acres of land, which is commonly known as the San Caytano pasture or fence, and perhaps is referred to in the order of injunction as the Coyentano fence. This San Caytano pasture is marked "Fence No. 2" on the plat. Within the limits of this pasture this defendant has a ranch-house and smaller pastures, and has had the same for more than two years prior to the commencement of this suit, using the same in his cattle business.

On many occasions since the erection of this fence, it has been surreptitiously and unlawfully cut in places, by parties unknown to this defendant, and in violation of law, but defendant has always replaced the wires so cut, so as to again use said fence; that shortly before the bringing of this suit a part of this fence was again cut by unknown parties and before this defendant could repair the same the present suit was filed and the petition for injunction filed; said fence had only been cut a few days before the filing of said petition, and therefore defendant had not completed repairing said fence, so cut at the time said petition was filed; nevertheless, the present injunction of this Court restrains this defendant from repairing said fence, or at least said construction might be placed upon the said injunction, and this defendant, not wishing in any way, to disobey said injunction, asks that said injunction

be modified so that he can repair said fence.

In February, 1913, this defendant did fence up another pasture upon said grant, claiming that he had the right to do the same, as owner of an interest therein, said fence enclosing 1400 acres of land, and is marked "Fence No. 3," on said plat of Baca Float No. 3, annexed hereto; and this pasture or enclosure is perhaps referred to in said injunction as the Garden Fences. The fence enclosing this pasture has been unlawfully cut by parties [125] unknown to defendant and against the law at divers and sundry times, since defendant erected the same, but this defendant has each time repaired the fence so cut, so as to maintain said pasture; a portion of this fence was also cut a short time prior to the filing of the petition herein for an injunction, and although this defendant had erected said enclosure and fence and had been using the same for more than a year before the filing of said petition and the bringing of this suit, nevertheless, the said injunction aforesaid, restrains this defendant from repairing said fence and said pasture.

This defendant, for many years has been and still is engaged in grazing cattle on the ranch, and all of said pastures are necessary for him to use in his business; but the injunction of this court restrains him from using the same, to his great loss and damage.

Defendant further represents that in 1913, he did erect another fence, from the northwest corner of the pasture marked "Pasture No. 2," on said plat, and running thence northerly to the fence of certain homesteaders; this fence is known as the San Bahtano fence, and perhaps is referred to as the Coyentano fence in said writ of injunction. Said fence has also been cut and the injunction of this Honorable Court prevents defendant from repairing the same.

Defendant did also in the year 1912, erect a fence along a portion of the boundary line of said grant, as marked on the plat "Wise Fence," and has maintained the same ever since, except when the same has been unlawfully cut by unknown parties, and this fence also this defendant is enjoined from maintaining, by the said writ of injunction.

On the south line of said Float in the year 1914, and some months before this suit was brought, defendant did also erect a fence, as shown on the said plat, which fence was also cut at various times, and the said injunction restrains this defendant from repairing the said fence. [126]

Defendant further states that the main watering place upon said Baca Float No. 3, is the Santa Cruz River, which runs through said Float a distance of over twelve miles, as shown by said plat; but none of the pastures enclosed by this defendant prevent the cattle of anyone whatsoever from watering at said Santa Cruz River, and therefore this defendant should not be restrained from repairing the fences of his pastures, all of which, as aforesaid, were erected and completed long before this suit was commenced. Defendant further represents that the San Jose de Soniota Grant is private property, belonging to parties not parties to this suit; that the

same is fenced as shown on the said plat; that the Sonoita Creek is also a watering place for cattle, as shown on the said plat, but all of the said Sonoita Creek within the limits of said San Jose de Sonoita Grant is fenced off by the owners of said grant; therefore, the fence surrounding the said pasture No. 2, marked "Wise Field" on said plat, on the east side thereof, does not prevent any cattle from obtaining water.

Defendant further represents that the order of this Court, of July 20th, 1914, directs that said writ of injunction do issue upon plaintiffs filing a bond to this defendant in the sum of \$5,000, but said order does not require any sureties on said bond; nor is said bond required to be in accordance with any practice or rule of this court, or with any statute; that the plaintiffs are nonresidents of the State of Arizona; that they have no property in the said State, except their alleged claim to said Baca Float No. 3, the validity of which claim is denied by this defendant, and by other defendants in this suit; and that the said order should be modified so as to require plaintiffs to give a bond with sureties to be approved by this Court, or by the clerk thereof.

WHEREFORE, this defendant prays that the said writ of injunction be modified so as not to restrain or enjoin this defendant from maintaining his said pastures aforesaid, or any of them; [127] that it be further modified so as not to restrain this defendant from maintaining any of the fences which he had erected and was maintaining at the time the petition in this suit was filed, and that the order

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for said injunction be further modified by requiring plaintiffs to file a bond with at least two sureties or a satisfactory surety company, to be approved by this Honorable Court or the clerk thereof; and be otherwise modified, as this Honorable Court may deem necessary upon the hearing of all the facts relative thereto.

Defendant further prays that this Honorable Court do set a day for the hearing of this petition, and that the same be heard upon said day, and that upon said hearing said injunction be modified as aforesaid.

JOSEPH E. WISE,

Defendant.

SELIM M. FRANKLIN

Attorney for Defendant, Joseph E. Wise.

State of Arizona,

County of Pima,—ss.

Joseph E. Wise, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing petition and motion and knows the contents thereof and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those matters he believes the same to be true.

JOSEPH E. WISE.

Subscribed and sworn to before me this 26 day of September, 1914.

My Commission expires Feb. 13, 1918.

WM. A. JACKSTADT, [Seal]

Notary Public.

Filed September 28, 1914. [128]

In the United States District Court for the District of Arizona.

CORNELIUS C. WATTS et al.,

Plaintiffs,

ys.

SANTA CRUZ DEVELOPMENT COMPANY et al.,

Defendants.

Order Modifying Injunction.

IT IS ORDERED that the injunction against Joseph E. Wise issued in the above-entitled cause on the 20th day of July, 1914, be modified in the following particulars:

That the said Joseph E. Wise be and hereby is permitted to repair and rebuild that certain fence on Baca Float No. 3, known as the "Garden Fence," and which fence extends from a point on the easterly line of said Float about a mile and a half north of the north line of the Sonoita grant and thence extends in a general westerly and southerly direction to the north line of the Sonoita grant at a point about a mile and a half or two miles west of the east line of the Baca Float;

And also that the said Joseph E. Wise may be permitted to repair and rebuild the fence around what is known as the San Caytano pasture; and

That said injunction as herein modified shall be in force until the further order of this Court.

IT IS FURTHER ORDERED that any of the parties hereto may at any time apply to this Court

for a further or any modification of this injunction at any time upon giving reasonable notice thereof.

IT IS FURTHER ORDERED that the said Joseph E. Wise shall not drive upon or place upon that part of Baca Float No. 3, lying [129] west of Santa Cruz River, any cattle and livestock beyond and in addition to the cattle and livestock which he has now running upon said part of said Float.

IT IS FURTHER ORDERED that the modifications of the said injunction shall in no manner affect the possessioner claim of possession of either party hereto to the whole or any part of Baca Float No. 3, but said questions of possession shall be determined without regard to said modifications.

Dated this 6th day of November, 1914.

WM. H. SAWTELLE, Judge. [130]

Stipulations as to Certain Facts.

During the trial of this case counsel for all the parties stipulated in writing and in open court that the following should also be deemed and considered as facts in this case, to wit:

FACTS AS TO THE BOULDIN HEIRS.

That David W. Bouldin, Sr., was the father of D. W. Bouldin, Jr., James E. Bouldin and P. W. Bouldin; that David W. Bouldin, Jr., never married and that he died intestate May 21, 1889; that David W. Bouldin, Sr., died at Denver, Colorado, in December, 1893, that Mrs. David W. Bouldin, his wife, died at Denver, Colorado, in December, 1893, previous to the death of David W. Bouldin; that neither David W. Bouldin, Sr., nor Mrs. David W. Bouldin,

his wife, left a will; that at the time of the death of Mrs. David W. Bouldin and David W. Bouldin, Sr., James E. Bouldin and P. W. Bouldin were their only surviving children and heirs at law; that Daisy Belle Bouldin, the first wife of James E. Bouldin, is dead; that she died intestate, and left surviving her, as her sole heirs at law, two children, David W. Bouldin, Jr., and Helen Lee Bouldin, defendants in this action.

The plaintiffs and Santa Cruz Development Co. only, also stipulated that whatever title passed from John C. Robinson to Powhatan W. Bouldin and James E. Bouldin by the deed of November 19, 1892, is now vested one-half in James E. and Jennie N. Bouldin, and one-half in David W. Bouldin, Jr., and Helen Lee Bouldin.

FACTS AS TO ALEXANDER F. MATHEWS.

That Alexander F. Mathews was born on or about December [131] —, 1838, at Lewisburg, W. Va., and was married in 1866 at Christiansburg, W. Va., to Laura Gardner; died at a hospital in Philadelphia, Pa., on or about December 10, 1906. He was throughout his life a resident of Lewisburg, W. Va. He was survived by his widow, Laura G. Mathews, and the following adult children: Mason Mathews, Charles G. Mathews, Elizabeth P. Mathews and Henry Mason Mathews. He left no adopted child or children or the issue of any adopted child or children, or the issue of any deceased child. He was married only once, and his marriage was dissolved only by his death.

Samuel A. M. Syme was married on or about De-

cember 13, 1866, to Mary Maxwell at Tappahanock, Va., and his said wife died at Washington, D. C., on or about March 10, 1910. At the time of his marriage said Syme was and ever since has been a resident of the State of West Virginia or the District of Columbia. The only children of the marriage are Conrad H. Syme, William Henry Syme, James C. Syme, Mary Maxwell Syme and Elizabeth S. Whitehead. Mr. Syme was married only once and his marriage was dissolved only by the death of his wife as aforesaid.

FACTS AS TO THE HEIRS OF JOHN IRE-LAND.

That John Ireland, deceased, died intestate on or about the 15th day of March, 1896, leaving surviving him as his heirs and devisees, Mrs. A. M. Ireland, his widow, Mrs. M. I. Carpenter, a daughter, Pat C. Ireland, a grandson, and son by adoption, Ireland Graves, a grandson, being the son of a deceased daughter of John Ireland and Anna R. Wilcox and Eldredge I. Hurt, grandchildren, also being the children of a deceased daughter of John Ireland; that the said Mrs. M. I. Carpenter, Pat C. Ireland, Ireland Graves, Anna R. Wilcox and Eldredge I. Hurt, as the devisees and heirs of said John Ireland, are entitled to receive and have an undivided 1/2 of all the property owned [132] by said John Ireland at the time of his death, and that their interest in said property is as follows: Mrs. M. I. Carpenter, an undivided one-fourth; Pat C. Ireland, an undivided one-fourth; Ireland Graves, an undivided onefourth, and Anna R. Wilcox and said Eldredge I. Hurt, each an undivided one-eighth.

Stipulation Permitting Representatives of John Ireland to Intervene.

It is hereby stipulated by all of the parties to this action that Mrs. M. I. Carpenter, Pat C. Ireland, Ireland Graves, Anna R. Wilcox and Eldridge I. Hurt be permitted to intervene in this action; that they be made parties defendant and be permitted to file an answer to the plaintiffs' bill of complaint and to appear in said action and make a defense thereto, it being agreed that all proceedings heretofore had and stipulations filed herein, shall apply to and bind those interveners, and that the answer of said interveners shall be deemed to be denied by all parties herein; that all the pleadings of the plaintiffs and defendants be decreed duly served on said interveners and at issue as to them, and that said interveners proceed to trial when the case is reached.

Stipulation as to Change of Title.

By consent the title as it originally stood was amended by correcting the names John Bouldin and Mary Bouldin to David W. Bouldin and Helen Lee Bouldin. [133]

Abstract of proceedings Including Testimony and Exhibits.

This cause came on to be tried before the Court on the 26th day of March, 1915, before the Hon. William H. Sawtelle, District Judge.

The following solicitors appeared for the respective parties, to wit:

- For the Plaintiffs: Messrs. HERBERT NOBLE, HARTWELL P. HEATH, SAMUEL L. KINGAN.
- For the Defendants Joseph E. Wise and Lucia J. Wise: Mr. SELIM M. FRANKLIN.
- For the Defendants Bouldin: Messrs. JOSEPH W. BAILEY, WELDON M. BAILEY, JOHN H. CAMPBELL.
- For the Defendant Santa Cruz Development Company: Mr. G. H. BREVILLIER.
- For the Defendants Jesse H. Wise and Margaret W. Wise: Mr. JAMES R. DUN-SEATH.
- For the Defendants (Intervenors) M. I. Carpenter, Patrick C. Ireland, Irelend Graves,
- Anna R. Wilcox, Eldredge I. Hurt: Mr. JOHN D. MACKAY.

[Stipulation in Open Court, etc.]

It was stipulated in open court that the plaintiffs might file an engrossed copy of their first complaint, with the various amendments thereto, the same to be designated as "Plaintiffs' Amended Complaint," which amended complaint was filed on the 26th day of March, 1915, and bears the paragraph numbers of the original complaint which was filed on the 23d day of June, 1914.

It was further stipulated in open court that the various answers and pleadings heretofore filed by the respective defendants and intervenors should be deemed and considered as the answers and pleadings to the said amended complaint.

It was further stipulated in open court that all new matter set forth in each of the answers of the respective defendants and intervenors should be deemed and considered as denied by the plaintiffs, and each of the other defendants [134] and intervenors, without the necessity of filing further replies or replications thereto.

Evidence Introduced by Plaintiffs.

Thereupon plaintiffs introduced evidence in support of their complaint, as follows:

Plaintiffs' Exhibit "A."

Plaintiffs introduced in evidence without objection, as Plaintiffs' Exhibit "A," the opinion of the Supreme Court of the United States, in the case of Lane v. Watts, in which it was held that the location of the grant on June 17, 1863, and the approval of it by the Surveyor General of New Mexico and subsequently on April 9, 1864, by Commissioner Edmunds of the land office, transferred the title thereto to the heirs of Luis Maria Baca; and that the land would be segregated from the public domain by the filing of the Contzen survey. As it is printed in full in 234 U. S. pp. 525–542, it is not copied at length here.

Plaintiffs' Exhibit "B."

Plaintiffs introduced in evidence without objection, as Plaintiffs' Exhibit "B," the opinion of the Supreme Court of the United States denying a motion for rehearing in the said case of Lane v. Watts, in which it was held that the lands covered by the Tumacacori and Calabasas grants were not reserved

at the time of the 1863 location of Baca Float No. 3; and that the only conflict therewith which requires local adjudication is from a portion of the San Jose de Senoita grant which has been confirmed as against the United States, and the superior title thereto could not be determined [135] in the case before the Court because the parties claiming the Senoita grant were not before the Court. As it is printed in full in 235 U.S. 17 et seq., it is not copied at length here.

Plaintiffs' Exhibit "C."

Plaintiffs offered in evidence a deed in the words and figures following, the nature of the case requiring that it should be set forth in extenso: [136] Deed of Conveyance from the Heirs of Luis Maria Baca to John S. Watts-Locations No. 2, 3, 4.

KNOW ALL MEN BY THESE PRESENTS: That we, Luis Baca, Prudencia Baca, Jesus Baca, and Domingo, sons of Luis Maria Baca, residents of Pena Blanca, Territory of New Mexico; that we, Josefa Baca y Lucero, wife of Luis de Lao, and Altagracia Baca, wife of Francisco Martine, daughters of Luis Maria Baca, residents of Pena Blanca, New Mexico, in our own proper persons, and we, either in our own person or by our attorney in fact Tomas Baca; to wit: Jesus Baca, Tomas Baca, Encarnacion Baca, wife of Manuel Viscano, Josefa Baca, wife of Demetrio de Lao, Jose Baca, Tomas Baca 2nd, Trinidad Baca, wife of Fernando Delgado, Altagracia Baca, wife of Patricio Silva, children of Juan Antonio Baca, deceased, son of Luis Maria Baca; we, Francisco Silva, Isabel Silva, wife

of Vicente Amijo, Jesus Maria Silva, Benito Silva, Valentine Silva and Manuel Silva, children of Cesaria Baca, deceased, who was a daughter of Juan Antonio Baca, deceased; we, Isabel Baca, wife of Jose Decetio Leno, David Baca, Santiago Baca, Maria Baca, wife of Luis Maria Ortiz, and Adeliete Baca, children of Domingo Baca, deceased; son of Juan Antonio Baca; we, Antonio Baca, Felipa Baca, wife of Jose Baca, Jesus Maria Baca, Fernando Baca, Josefa Baca, wife of Jesus Baca, Polonia Baca, wife of Pedro Archleque, and Francisco Baca, children of Jose Baca, deceased, son of Luis Maria Baca; we, Quesciro Baca, Diego Baca, Guadalupe Baca, wife of Jesus Maria Leiva, Romaldo Baca, Martina Baca, and Paulina Baca, children of Miguel Baca, deceased, son of Luis Maria Baca; we, Luis Maria Baca, Alejandro Baca, Juan de Dios Baca, and Martino Baca, children of Matio Baca deceased, son of Luis Maria [137] Baca, deceased; we, Antonio Trujillo, Maria Josefa Trujillo, wife of Cesario Ramirez, Andres Trujillo, Juano Trujillo, children of Guadalupe Baca, daughter of Luis Maria Baca, and wife of Santiago Trujillo; and we, Josefa Lopez, wife of Nicolas Amijo, and daughter of Filiciana Trujillo, deceased, daughter of Guadalupe Baca, deceased, Marto Lopez, son of said Filiciana Trujillo, Altagracia Lopez, wife of Francisco Ramirez, and daughter of said Feliciana Trujillo, Jesus Matio Trujillo, son of Guadalupe Trujillo, deceased, who was the daughter of Guadalupe Baca, deceased; we, Josefa Sales, wife of Jose Martini, and daughter of Rosa Baca, deceased, daughter of Luis Maria

Baca, Dolores Baca, daughter of Rosa Baca, deceased; we, Esperidion Baca, and Refugio Baca, children of Francisco Baca, deceased, son of Rosa Baca we, Josefa Baca v Sanchez, daughter of Luis Maria Baca, and wife of Juan Luis Montoya; we, Antonio Garcia, Francisco Garcia, Maria Enes Garcia, Juana Maria Garcia, and Maria de Los Angeles Garcia, children of Juana Baca, deceased daughter of Luis Maria Baca, and wife of Jose Garcia; we, Josefa Baca y Lucero, daughter of Luis Maria Baca, and wife of Luis de Lao; we, Altagracia Baca, daughter of Luis Maria Baca, and wife of Francisco Martini; I, Tomas Cabeza de Baca, owner of the interest and claim of Manuel Baca, son of Luis Maria Baca, to his interest as heir of Luis Maria Baca, as appears by deed of conveyance executed the 17th day of June, 1861, and duly recorded in the Record Book of the Register of Deeds for Santa Ana County, Letter D, pages 6-7, and I, Tomas Cabeza de Baca, owner of the interest of Ignacio Baca, only son and heir of Ramon Baca, deceased, son of Luis Maria Baca, as appears by deed of said Ignacio Baca and Maria Guadalupe Hurtado to said Tomas Cabeza de [138] Baca, executed on the 1st day of June, 1861, and duly recorded in Record Book D. of Deeds for Santa Ana County, pages 5-6; I, Jesus Maria Cabeza de Baca, owner by purchase of the interest of Jesus Baca y Lucero 1st and the son of Luis Maria Baca, as appears by deed of said Jesus Baca y Lucero, and Maria Rafaela Amijo, his wife, executed the 20th day of August, 1861, and recorded in the Record Book Letter

D, page 12-13 of the Register of deeds for Santa Ana County; and I, Francisco Baca, owner by purchase of the interest of Domingo Baca, son of Luis Maria Baca, for and in consideration of the services of John S. Watts, for many years, in and about the business of said heirs of Luis Maria Baca, as the attorney of said heirs, and for the further consideration of Three Thousand Dollars, paid by the said John S. Watts, to Tomas Cabeza de Baca, our attorney in fact, have bargained, sold and conveyed, and by these presents do bargain, sell and convey to the said John S. Watts, of Santa Fe, New Mexico, and to his heirs and assigns forever, all our right, title and interest and demand in and to the following lands located upon by us as the heirs of Luis Maria Baca, under the 6th section of an act of Congress approved June 21st, 1860, to wit:

Location No. 2. Situate in the Canadian or Red River in the Territory of New Mexico, and described as follows, to wit: Beginning at the corner to sections 21, 22, 27, and 28 in Township 13 North, of the Base Line and Range 29 East of New Mexico Principal Meridian, running from said initial point North six miles, eighteen chains and twenty-two links; thence East twelve miles thirty-six chains and forty-four links; thence South twelve miles, thirty-six chains and forty-four links; thence North six [139] miles, eighteen chains and twenty-two links, to the place of beginning, containing Ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine one hundredths of an acre, more or less. And also Location No. 3. Situate in the Territory

of Arizona, formerly in Dona Ana County, New Mexico, and described as follows, to wit: Commencing at a point one and one-half miles from the base of the Salero Mountain in a direction North fortyfive degrees East of the highest point of said mountain, running thence from said beginning point West twelve miles thirty-six chains and forty-four links; thence South twelve miles, thirty-six chains and forty-four links; thence East twelve miles, thirty-six chains and forty-four links; thence North twelve miles, thirty-six chains and forty-four links, to the place of beginning containing Ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine one hundredths acres, more or less.

Also Location No. 4. Situate in Costillo County, Colorado Territory, formerly in Taos County, New Mexico, known and described as follows, to wit: Beginning at a point on the Eastern edge of the San Luis Valley, where the thirty-eighth degree of latitude crosses the dividing line of the plain and mountain; thence East along said parallel of latitude four and one-half miles; thence South at a right angle to said parallel of latitude twelve and onehalf miles; thence North at a right angle twelve and one-half miles to the aforesaid parallel of latitude; thence East with said parallel of latitude eight miles, to the place of beginning, containing Ninety-nine thousand, two hundred and eightynine acres and thirty-nine one-hundredths of an acre [140] more or less.

TO HAVE AND TO HOLD the lands aforesaid with all of the appurtenances and privileges to the same belonging to the said John S. Watts, and his heirs forever, in fee simple, and the said heirs of Luis Maria Baca, in person, and by their attorney in fact, Tomas Cabeza de Baca, covenant with the said John S. Watts and his heirs, for themselves and their heirs, as follows, to wit:

- 1st. That they are seized in fee of the lands aforesaid and have good right and title to the same.
- 2d. That the said lands are free from incumbrances, and that they have full power to sell and convey the same.
- 3d. That the said John S. Watts and his heirs and assigns shall quietly enjoy said lands forever, free from all claim or demand of the said heirs of Luis Maria Baca, their heirs, executors and administrators.
- 4th. That they will defend and protect the title aforesaid against all claim or claims of title arising from or under us as heirs of Luis Maria Baca, or under our heirs and executors and administrators.
- 5th. That the said John S. Watts and his heirs and assigns shall forever enjoy the lands aforesaid in as full and ample a manner as the heirs of Luis Maria Baca held and enjoyed the said lands, just before the execution of this conveyance.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 1st day of May, 1864.

DIEGO BACA. (Seal)
LUIS BACA. (Seal)
DOMINGO BACA. (Seal)
JESUS MARIA BACA. (Seal)

[141]

Purchaser of the interest of Jesus Baca y Lucero 2d.

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160 Joseph E. Wise and Lucia J. Wise vs.
       FILIPE BACA.
                                      (Seal)
       LUIS de LAO,
                                      (Seal)
   Esposa de Josefa Baca.
       JOSEFA BACA.
                                      (Seal)
       MARIA ALTAGRACIA BACA.
                                      (Seal)
       PRUDENCIA BACA.
                                      (Seal)
      TOMAS C. de BACA.
                                      (Seal)
Attorney in fact for the heirs of Juan Antonio Baca.
      TOMAS C. de BACA,
                                      (Seal)
Attorney in fact for the heirs of Jose Baca.
      TOMAS C. de BACA, (Seal)
Purchaser of the interest of the heirs of Ramon
    Baca.
      TOMAS C. de BACA.
                                      (Seal)
Attorney in fact for the heirs of Mateo Baca.
      TOMAS C. de BACA,
                                      (Seal)
Attorney in fact for the heirs of Jesus Baca v Lu-
    cero 1st.
      TOMAS C. de BACA.
                                      (Seal)
Purchaser of the interest of Manuel Baca.
       TOMAS C. de BACA.
                                      (Seal)
Attorney in fact for the heirs of Guadalupe Baca.
       TOMAS C. de BACA.
                                      (Seal)
Attorney in fact for the heirs of Rosa Baca.
      TOMAS C. de BACA,
                                      (Seal)
Attorney in fact for the heirs of Josefa Baca v
    Sanchez.
      TOMAS C. de BACA,
                                      (Seal)
Attorney in fact for the heirs of Juana Puala Baca.
       JESUS M. BACA,
                                       (Seal)
Purchaser of the interest of Jesus Baca y Lucero 2d.
       FRANCISCO MARTINO,
                                      (Seal)
    Esposo de Ma. Altagracia Baca. [142]
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Yecutado y firmado en la presencia de Bernabe Baca and Altemacio Sanchez. Territorio De Nuevo Mexico, Condado De Santa Ana.

Personalmente se presenten ante me Agripito Tofoya, uno de los Jueces de Paz en v por el condado y Territorio de Nuevo Mexico los hijos y herederos de fuado Luis Ma. C. De Baca, cuvos nombre se hallan los qualles aparecen como otorgantes y conocidos por me, como los hijos y herederos de dicho Luis Ma. C. de Baca, y quallos confessen haber ajuculando y firmado con su espontancia voluntad el antecedentes documente para los fines y considerationes en el espresadas. Maria Altagracia Baca y Josefa Baca declaraon en una examinación separado de sus meridos, declaraon de haber firmado como su acto libre sin compuleron o influje elicate de parte de sus maridos y para su constancia lo fine yo, el Juez, con me propio mano en la presencia de los testigos en la Pena Blanco, hoy 2 de Mayo, del ano de Sor de 1864.

AGRIPITO TOFOYA,

JUEZ de PAZ.

Which acknowledgment translated reads as follows:

Territory of New Mexico, County of Santa Ana,—ss.

Personally appeared before me Agapito Tafoya, one of the Justices of the Peace in and for said county and Territory of New Mexico, the children and heirs of the late Luis Maria C. de Baca, whose names are subscribed to the foregoing document by parties appearing thereunto to be duly authorized,

and who are known to me to be the children [143] and heirs of said Luis Maria C. de Baca, and they acknowledged that they voluntarily executed and signed the foregoing document for the purposes and considerations therein specified. Maria Altagracia Baca and Josefa Baca declared upon an examination apart from their respective husbands that they had signed as their free act without compulsion or undue influence on the part of their respective husbands; and in confirmation of which, I, the said Justice, sign this with my own hand and in the presence of two witnesses in Pena Blanco, this 2d day of May in the year of our Lord 1864.

AGAPITO TAFOYA,

Justice of the Peace.

United States of America, Territory of New Mexico.

I, Samuel Ellison, clerk of the Superior Court of said Territory do hereby certify that Agripito Tofoya, before whom the foregoing acknowledgment was made and whose genuine signature is thereto attached, was at the time thereof, a Justice of Peace in and for said county of Santa Ana, Territory of New Mexico, duly qualified to act as such, and that his official acts are entitled to full faith and credit.

IN TESTIMONY WHEREOF I hereunto set my hand and seal of said court at Santa Fe, this 5th day of May, 1864.

[Seal] SAM'L ELLISON,

Clerk Supreme Court of N. M. [144]

Recorded May 14, 1864, in Probate Court of Santa Fe County, New Mexico, in Book 6, pages 551–555, in Bernalillo County, New Mexico, October 21, 1864, in Volume I, pages 314–318; in San Miguel County, New Mexico, in Book 3, page 51; in Pima County, Arizona, on May 25, 1894, Book D. R. E., 26, at page 364 and also at page 547, and thereafter in Santa Cruz County, Arizona, in Book 1 D. R. E., pages 93–99, and in Book 2 D. R. E., pages 142–148.

The defendants Joseph E. Wise and Lucia J. Wise objected to the instrument, as the deed of certain heirs, on the following grounds:

First. That it is signed by Felipe Baca, but in the body of the deed itself he is not named as a grantor. He does not pretend, in the instrument itself, to convey anything to anybody. His signature is appended to a paper which is executed by others to which he is not a party, and therefore it is not his deed at all and conveys nothing as to him.

Second. The deed is signed also, "Domingo Baca," but the body of the deed recites that Franco Baca is the purchaser of the interest of Domingo Baca. The deed is not signed by Franco Baca, but it is signed by Domingo, and the face of the deed shows that Domingo when he signed the deed had parted with his interest.

Third. The deed is signed also Jesus M. A. Baca, purchaser of the interest of Jesus Baca y Lucero. The deed in the body of it recites that Jesus Maria Cabeza Baca, who we concede is the same person as Jesus M. A. Baca, is the owner by purchase of the interest of Jesus Baca y Lucero the first. It is signed by him as the purchaser of the interest of Lucero the second, and there were too of those

Luceros, the first and the second. Therefore, it is not—if he were the purchaser of the interest of Jesus Baca y Lucero the second it does not convey the interest of himself as the purchaser of Lucero the [145] first.

Fourth. The deed is also signed "Thoma C. Baca, attorney in fact for the heirs of Jesus Baca y Lucero the first." In the body of the deed Jesus Baca y Lucero the first is not recited as a party; his heirs are not recited as parties. Tomas C. Baca is not recited as their attorney in fact. In other words, in the body of the deed Jesus Baca y Lucero the first is not a party to it by himself or his heirs or attorney in fact, or at all. Therefore, as to him, we have a deed signed by one who purports to be the attorney in fact of the heirs of Jesus Baca Lucero the first, and the heirs of Jesus Baca Lucero the first do not pretend to be parties to the instrument at all.

Fifth. The deed is also signed "Tomas C. Baca, attorney in fact for the heirs of Josefa Baca y Sanchez. Now the deed recites that Josefa Baca y Sanchez is a party of the first part—a grantor. The deed recites that Josefa Baca y Sanchez conveys, but the deed is not signed by her; it is not signed by her attorney in fact. But it is signed by Tomas C. Baca as attorney in fact for her heirs, and of course, does not convey any of her interest.

Thereupon the Court ruled that the instrument would be received in evidence subject to the objec-

Plaintiffs' Exhibit "D."

tions of the defendants Joseph E. Wise and Lucia J.

Wise, whereupon it was marked Plaintiffs' Exhibit "C."

Plaintiffs introduced in evidence without objection as Plaintiffs' Exhibit "D," a deed from Quirina Baca, Guadalupe Baca and Jesus Leyva, her husband, Paulina Baca, Martina C de Baca and Romalda Baca to John S. Watts, dated May 1, 1864, conveying all the grantors' interest in Baca Float No. 3 by [146] the description contained in Plaintiffs' Exhibit "C."

Plaintiffs' Exhibit "E."

Plaintiffs offered in evidence, as Plaintiffs' Exhibit "E," a petition signed "John S. Watts, attorney for petitioners," to the Surveyor General of New Mexico, for the confirmation of the Ojo del Espiritu Santo Grant, which is in words and figures following:

"Territory of New Mexico,

County of Santa Fe,—ss.

To the Hon. A. P. Wilbar, Surveyor General of the Territory of New Mexico, under the Act of Congress approved 22d July, 1854.

Your petitioners, the surviving heirs at law of one Luis Maria Cabeza de Baca, deceased, would respectfully state to you that on the 23d day of May, 1815, the said Baca presented his petition to the government of the province of New Mexico, asking for a grant of land to himself and children, at a place called Ojo del Espiritu Sant, situate in the County of Santa Ana, Territory of New Mexico. On the 24th day of May, 1815, the said grant was duly made of said land by the governor of said province and on

the 13th day of June, 1815, the said Baca was duly placed in possession of the land so granted, having for their boundaries the following points—On the east the summit of the Jemez mountain; on the west, the Puerco River and the point of the Prieto Table land; on the North the table land commonly called la Vantana; on the South the Canon of La Querencia, and the boundary of the farm of Don Antonio Arimenta; all of which facts will more fully appear by reference to a copy of said Petition, Grant and Possession hereby made a part of this petition, marked as exhibit "G" herein. [147]

Your petitioners further state that the said land marks and boundaries are well known and easily pointed out, but inasmuch as no survey of said land has ever been made, the quantity of land included in said boundaries is not known to your petitioners. Your petitioners further state that the said Luis Maria Cabeza de Baca in his lifetime occupied, cultivated, lived upon and put valuable improvements upon said lands, and up to the time of his death, about the year 1830, continued to possess said lands, without any other person claiming them, nor up to this time do your petitioners know of any adverse title to said land.

Your petitioners further state that the said Luis Maria Cabeza de Baca, a short time before his death, was driven away from said land by the hostility of the Navajo Indians and it has not been since occupied on account of its exposure to the hostility of said Indians who have been almost constantly at war which has prevented its occupancy by your petition-

ers. Your petitioners further state that said lands are not now in the actual possession of anyone, nor are they claimed by any persons but your petitioners, who claim said lands as theirs absolutely, by virtue of said grant, as the heirs at law of the said Luis Maria Cabeza de Baca. Your petitioners further state that at the death of the said Luis Maria Cabeza de Baca he left him surviving, as his heirs, the following children, to wit: Luis Baca, Prudencio Baca, Jesus Baca, Sr., Jesus Baca, Jr., Felipe Baca, Domingo Baca, Manuel Baca, Josefa Baca y Salas, Josefa Baca y Sanchez, Juan Antonio Baca, Jose Baca, Jose Miguel Baca, Ramon Baca, Matia Baca, Guadalupa Baca, Altagracie Baca, Rosa Baca, Juan Paula Baca.

The said Juan Antonio died, leaving as his heirs him surviving the following children and heirs: Jesus Maria [148] Baca, Francisco Tomas Baca, Encarnacion Baca, Jose Baca, Josefa Baca, Altagracia Baca, Nicholasa Baca, Tomas Baca, Trinidad Baca, Cesaria Baca, Domingo Baca, Guadalupe Baca.

The said Jose Miguel Baca died, leaving the following children and heirs him surviving: Diego Baca, Quirina Baca, Rumaldo Baca, Guadalupe Baca, Pauline Baca and Martine Baca.

The said Ramon Baca died leaving him surviving the following child and heir: Ignacio Baca.

The said Matio Baca died leaving him surviving the following children and heirs: Luis Baca, Alejandro Baca, Juan de Dios Baca and Martin Baca.

The said Jose Baca died leaving him surviving the following children and heirs: Anaonio Baca, Felipa

Baca, Jose Maria Baca, Francisco Baca, Fernando Baca. Polonio Baca.

Your petitioners further state that the above list contains the names of all the living children and grandchildren of the said Luis Maria Cabeza de Baca.

Your petitioners further state that Cesaria Baca, daughter of Juan Antonio Baca, is dead and left her surviving the following children and heirs: Francisco Silva, Isabel Silva, Jesus Maria Silva, Benito Silva, Balentin Silva and Manuel Silva. The said Domingo Baca, son of the said Juan Antonio, is dead, leaving him surviving the following children and heirs: Ysabel Baca, David Baca, Eulalio Baca, Santiago Baca and Adeleida Baca. The said Guadalupe Baca, daughter of said Luis Maria Cabeza de Baca, is dead, leaving her surviving the following children and heirs: Maria Trujillo, Antonio Trujillo, Andres Trujillo and Feliciana Trujillo, Juana Trujillo. Your petitioners further state that Rosa Baca, daughter of Luis C. de Baca, died leaving her surviving [149] the following children and heirs: Francisco Baca, Dolores Baca, Josefa Salas.

Your petitioners further state that Juana Paula Baca, daughter of Luis Maria C. de Baca, died, leaving the following children and heirs: Antonio Garcia, Francisco Garcia, Inez Garcia, Ana Maria Garcia and Josefa Garcia. Your petitioners further state that Feliciana Trujillo, daughter of Guadalupe Baca, is dead, leaving the following children and heirs her surviving: Josefa Lopez, Marto Lopez, Altagracia Lopez.

Your petitioners further state that all of said heirs are residents of the Territory of New Mexico and desire to occupy and cultivate said lands so soon as their title is confirmed and they can do so with safety from the hostility of the Navajo Indians, now in a state of war. Your petitioners further state that they have an absolute title in fee to said lands and ask that the same be confirmed under the act of July 22, 1854, in order that they may obtain a legal title thereto, in conformity with the provisions of said act.

All of which is respectfully submitted.

JOHN S. WATTS, Attorney for Petitioners.

Plaintiffs' Exhibit "F."

Plaintiffs introduced in evidence, as Plaintiffs' Exhibit "F" a certified copy from the Surveyor General's Office of New Mexico, of the testimony of Jose Francisco Salas and Manuel Hurtado taken by the Surveyor General of New Mexico in connection with plaintiff's Exhibit "E" which accompanied the petition above mentioned, which instruments were in words and figures following, to wit: [150]

The Heirs of LUIS MARIA CABEZA DE BACA,

VS.

THE UNITED STATES.

Jose Francisco Salas being first duly sworn upon his oath states:

Question 1st: Where do you reside, are you in any way related to the claimants or have you any interest in this claim?

Answer: I live in Pena Blanca. I am not related to the claimants, nor have I any interest in the claim.

Question 2d: Did you know Luis Maria Cabeza de Baca during his lifetime?

Answer: I did.

Question 3d: When did he die?

Answer: I saw him die, and was present when he was buried, but do not recollect exactly how long ago it was, but think it was in the year 1827.

Question: Please examine the list of the children, grandchildren and great-grandchildren, set forth in the petition in this case and state who they are.

Answer: I have examined the list set forth in said petition and it is a correct list of the names of all the children now living, also of the heirs of those that are dead.

Question: Where do said heirs reside?

Answer: In Mexico.

Question: Are you acquainted with a grant of land made to Luis Maria Cabeza de Baca, called Ojo del Espiritu Santo, and if so, state if it was ever occupied, cultivated and [151] improved by him in his lifetime, and if so, how long, and for what cause the occupancy was abandoned.

Answer: I am acquainted with said grant of land, it was occupied for about fifteen years by Luis Maria C. de Baca, and the lands extensively cultivated during the time he lived there; he was compelled to leave it on account of the hostility of the Navajo Indians. I remained there during about fifteen years while Don Luis Maria C. de Baca was living on said grant and after his death.

Question: State if it is occupied at present or not, and if not occupied, why not.

Answer: It is still unoccupied; its occupancy would be dangerous on account of the continued hostility of the Navajos. Attempts were frequently made to settle there, but were unsuccessful on account of the Indians.

Question: What number of animals did he have on said grant during his residence there?

Answer: The number of mares, horses and cattle which he then had there was about eight hundred.

Question: Have you ever heard of any other persons claiming said land but the heirs of Luis Maria C. de Baca?

Answer: It never was claimed by any person but the said heirs.

Question: When Don Luis Maria Cabeza de Baca first went there was there any person living upon said grant.

Answer: It was several leagues beyond Jamez and unoccupied up to the time he went there with his family and hired men.

His

JOSE FRANCISCO X SALAS,

mark

Witness:

J. HOWE WATTS, THO. MEANS. [152]

Sworn and subscribed before me this 23d day of October, A. D. 1860.

A. P. WILBAR, Surveyor General of New Mexico. Manuel Hurtado being first duly sworn upon his oath states:

Question: Where do you reside, are you related to the heirs of Luis Maria Cabeza de Baca, or interested in this claim?

Answer: I live in the County of Santa Ana, I am not related to the heirs nor interested in the claim.

Question: Do you know the place called Ojo del Espiritu Santo and if so who owned and lived upon it?

Answer: I know the place; it was owned by Don Luis Maria Cabeza de Baca and was resided upon by him until he was driven away by the Navajo Indians about the year 1816 or 1817. I went and assisted him in removing him and his family and what remained of his stock from that place; he remained there a considerable length of time but what number of years I cannot state; after the death of Don Luis Maria C. de Baca it was occupied by his heirs until they were compelled to leave it on account of the hostility of the Indians.

Question by the Sur. Genl. Do you know personally the heirs of Luis Maria Cabeza de Baca, who occupied it after his death?

Answer: I did and my son-in-law went there with them with their flocks and herds.

Question by the same: Are the names mentioned in the petitnon by the attorney J. M. Watts familiar to you and do you know them?

Answer: I do not know them and the names men-

tioned in the petition are correct.

His

MANUEL X HURTADO,

mark. [153]

Witness:

J. HOWE WATTS, THO. MEANS.

Sworn and subscribed before me this 23d day of October, A. D. 1860.

A. P. WILBAR,

Surveyor General of New Mexico.

All the defendants Wise by their counsel objected to the introduction of said instrument in evidence for the reason that it does not pretend to be a statement of all the heirs; that it is the *ex parte* affidavit of one who was not an heir himself, and not related to Luis Maria Baca, nor does it pretend to be from all of the children or all of the heirs of Luis Maria Baca. The Court overruled the objection and permitted said instrument to be received in evidence, to which ruling of the Court the defendants Joseph E. Wise and Lucia J. Wise, by their counsel, then and there duly excepted.

Plaintiffs' Exhibit "G."

Plaintiffs introduced in evidence without objection, a certified copy of a deed from Domingo Baca and Rosalia Garcia to Francisco Baca, dated February 19, 1863, the original being in Spanish, and an English translation thereof, conveying all [154] the interest of the grantors in the lands of Luis Maria Cabeza de Baca, deceased.

Plaintiffs' Exhibit "H."

Plaintiffs introduced in evidence without objection, as Plaintiffs' Exhibit "H," a certified copy of a deed in Spanish with the English translation from Jesus Baca y Lucero and Maria Rafael Armijo, to Jesus Maria C. de Baca, dated August 20, 1861, conveying all the interest of the grantors in the lands of Luis Maria Cabeza de Baca, deceased.

Plaintiffs' Exhibit "I."

Plaintiffs introduced in evidence without objection, as Plaintiffs' Exhibit "I," a deed from Manuel Baca to Tomas C. de Baca, dated June 17, 1861, conveying all the land grantor may receive as heir of his deceased father, Luis Maria Cabeza de Baca.

Plaintiffs' Exhibit "J."

Plainitffs introduced in evidence without objection, as Plaintiffs' Exhibit "J," a certified copy of a deed from Ignacio Baca and wife to Tomas C. de Baca, dated June 1, 1861, conveying the interest grantors may or can receive as heir of his deceased father Ramon Baca in the land of Luis Maria Baca, deceased.

Plaintiffs introduced in evidence without objection, certified copies of the following papers bearing the following Exhibit Numbers:

Plaintiffs' Exhibit "K-1."

This exhibit is in words and figures following, the nature of the case requiring it to be printed in full:

Santa Fe, New Mexico, June 17, 1863.

John A. Clark, Surveyor General, Santa Fe, New Mexico: I, John S. Watts, the attorney of the heirs

of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the act of Congress approved June 21st, 1860, the following tract, to wit: Commencing at a point one mile and a half from the base of the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles thirty-six chains and forty-four links, thence south twelve miles thirty-six chains and forty-four links, thence east twelve miles thirty-six [155] chains and forty-four links, thence north twelve miles thirty-six chains and forty-four links to the place of beginning, the same being situate in that portion of New Mexico now included by act of Congress approved February 24, 1863, in the Territory of Arizona—said tract of land is entirely vacant unclaimed by anyone, and is not mineral to my knowledge.

JOHN S. WATTS,

Attorney for the Heirs of Luis Maria Cabeza de Baca.

Plaintiffs' Exhibit "K-2."

Certificates of register and receiver approving said 1863 location, dated March 25, 1864.

Plaintiffs' Exhibit "K-3."

Approval of 1863 location by the Surveyor General of New Mexico.

Plaintiffs' Exhibit "K-6."

Letter and order of Commissioner of General Land Office, dated April 9, 1864, approving said 1863 location and ordering the survey thereof, being the approval of Commissioner Edmunds referred to in Lane v. Watts, 234 U. S. 525.

Plaintiffs' Exhibit "K-7."

This exhibit is in words and figures following, the nature of the case requiring it to be printed in full:

Washington City, April 30, 1866.

Hon. J. M. Edmunds,

Commissioner of Land Office.

Sir: You will find by reference to the papers in [156] file in your office, that on the 17th of June, 1863, I filed with the Surveyor General of New Mexico an application for the location of one of the five locations confirmed to the heirs of Luis Maria Cabaza de Baca under the sixth section of the act of Congress approved June 21, 1860. I further state that the existence of war in that part of the Territory of Arizona and the hostility of the Indians prevented a personal examination of the locality prior to the location, and not having a clear idea as to the direction of the different points of the compass, when the subsequent examination of the location was being made by Mr. Wrightson, in order to have the location surveyed, it was found that the mistake made would result in leaving out most of the land designed or intended to be included in said location. Mr. Wrightson was killed by the Indians, and no survey has been made because of said mistake in this initial point of location. Under these circumstances I beg leave to ask that the Surveyor General of New Mexico be authorized to change the initial point so as to commence at a point 3 miles west by south from the building known as the Hacienda de

Santa Rita, running thence from said beginning point north 12 miles 36 chains and 44 links, thence east 12 miles 36 chains and 44 links, thence south 12 miles 36 chains and 44 links, thence west 12 miles 36 chains and 44 links to the place of beginning. I beg leave further to state that this land which will be embraced in this change of the initial point is of the same character of unsurveyed vacant public land as that which [157] would have been set apart by the location as first solicited, but is not the land intended to have been covered by said location, but the land to be included within the boundaries above designated is the land that was intended to be located and was believed to have been located upon until preparations were made to survey said location. Under this state of the case it is hoped that directions will be given to the Surveyor General to correct the mistake.

Yours respectfully,

JOHN S. WATTS,

Attorney for heirs of Luis Maria Cabaza de Baca.

Plaintiffs' Exhibit "K-8."

This exhibit is in words and figures following, the nature of the case requiring that it be printed in full:

Department of the Interior, General Land Office, Washington, D. C., May 21, 1866.

John A. Clark, Esq.,

Surveyor General, Santa Fe, N. Mex.

Sir: On the 9th of April, 1864, instruction was issued by this office to Levi Bashfor, Surveyor-Gen-

eral of Arizona, for the survey of one of the five locations confirmed to the heirs of Don Luis Maria Baca under the sixth section of the act of Congress approved June 21, 1860.

The starting point of this location of the claim was to be a point $1\frac{1}{2}$ miles from the base of the Salero Mountain, in a direction north 45 degrees east [158] of the highest point of said mountain.

The original instructions aforesaid have been this day returned to this office by John S. Watts, attorney for heirs of Luis Maria Cabaza de Baca, dated April 30, 1866, together with a diagram of the intended location, but erroneously described by him in his application of the 17th June, 1863, addressed to you as the Surveyor General of New Mexico. The papers thus returned are herewith transmitted to you with directions that you cause the survey to be executed in accordance with the amended description of the beginning point which is described in Mr. Watt's application of the 30th April last, provided by so doing the out-boundaries of the grant thus surveyed will embrace vacant lands not mineral.

I am very respectfully,

J. M. EDMUNDS, Commissioner.

Plaintiffs' Exhibit "K-9."

Letter in words and figures following, the nature of the case requiring that it be printed in full:

Santa Fe, N. Mex., August 15,1877.

Commissioner General Land Office,

Washington, D. C.

Dear Sir: I have the honor to request that you

give me the permission to relocate Baca Float No. 3, which was located by my father in Arizona on land supposed to be vacant and not mineral, but which location was disproved by your office on account of its being mineral or for absence of proof that it was not mineral. The Baca heirs sold this to my father (Hon. [159] John Watts, deceased), and I am at present the attorney for all his heirs as well as part owner myself, and I respectfully request that you will aid me in getting it relocated for our benefit on lands vacant and not mineral. We now suppose its location to be on mineral lands.

Very respectfully yours,

J. H. WATTS,

Plaintiffs' Exhibit "K-10."

Letter from Commissioner of General Land Office to J. H. Watts, dated September 20, 1877.

"I am in receipt of your letter of the 15th ult.

In reply you are informed that the records of this office show that said location, which was made upon the application of John S. Watts, attorney for the heirs of Luis Maria Cabeza de Baca, dated June 17, 1863, and approved by the Surveyor General of New Mexico, on same date has not been surveyed, for the reason, it appears, that the claimants failed to deposit the necessary funds to pay the expenses of the survey, as required by the Act of June 2, 1862, and which in this case was estimated about \$900. This, however, at the present time is no obstacle to the execution of the survey, because the said Act of June 2, 1862, was repealed by the Act of February 28, 1871.

Some correspondence has been had by this office relative to the character of the land embraced in said location, whether or not the same was nonmineral as required by the 6th section of the Act of June 21, 1860, but I do not find that this location was disapproved by this office, but, on the other hand, instructions were subsequently given, May 21, 1866, for the survey according to the amended application of Mr. Watts of May 30, 1866." [160]

Plaintiffs' Exhibit "K-11."

Letter from John C. Robinson to Commissioner of General Land Office, dated February 13, 1885, in words and figures following, the nature of the case requiring that it be printed in full:

Sir: In accordance with the terms of the treaty of Guadalupe Hidalgo, all that territory known as New Mexico, formerly belonging to Mexico, was ceded to the United States.

In accordance with the terms of that treaty, the act of Congress approved June 21, 1860, was passed, by which the heirs of Luis Maria Baca were authorized to select 500,000 acres of non-mineral land in the Territory of New Mexico.

On May 1, 1864, the heirs of Baca conveyed to John S. Watts their interest above named.

On January 8, 1870, John S. Watts, sold and conveyed to Christopher E. Hawley the interest of Baca heirs in 100,000 acres of said land, which interest had been conveyed to him (Watts).

On January 13, 1870, Hawley executed a power of attorney to James Eldredge, authorizing him to [161] sell the property described in the convey-

ance made by Watts to him (Hawley).

On July 7, 1879, James Eldredge conveyed said property or interest, as attorney for Hawley, to John C. Robinson, of the State of New York, the present owner.

A certified copy of the deed from the Baca heirs to Watts, as recorded in New Mexico, and the originals of the deed from Watts to Hawley, of the power of attorney from Hawley to Eldredge, and the deed from Eldredge to Robinson are in possession of Robinson, and will be filed for examination if called for.

On June 17, 1863, John S. Watts, attorney for the heirs of Baca, notified the Surveyor General or New Mexico that a certain tract of land in the vicinity of Tubac, Arizona, had been selected as one of the tracts confirmed to said heirs. This location was approved by the Surveyor General and the approval transmitted to the General Land Office, and on April 9, 1864, the Surveyor General of Arizona was instructed to have said location surveyed.

On April 30, 1866, John S. Watts filed an amended description of the aforesaid selection, which was also approved by the Surveyor General and forwarded to the General Land Office to have the survey conform to the amended description. The survey was never made, and could not be made on account of the hostility of the Indians.

Since that date no definite action towards the location has been taken by the land office, nor [162] could the location selected have been confirmed, for the reason that the land was mineral land.

And now John C. Robinson, the present owner of the interest of the said heirs of said Baca in one-fifth of said grant of 500,000 acres, namely, 100,000 acres, asks that he may be authorized to locate the same on land non-mineral in that part of the United States which was known as being in the Territory of New Mexico on June 21, 1860.

Very respectfully, your obedient servant,

JOHN C. ROBINSON,

CHARLES A. ELDREDGE, WM. W. BELKNAP,

Attorneys for John C. Robinson.

Plaintiffs' Exhibit "K-13."

Opinion of Secretary Lamar, dated June 15, 1887, overruling Commissioner Harrison's decision which had permitted John C. Robinson in the name of the Baca heirs to relocate the grant. As it is printed in 5 L. D. 705, it is not copied here.

Plaintiffs' Exhibit "K-14."

Opinion of Secretary Hitchcock dated July 25, 1899, rejecting the 1866 location as being substantially a relocation, instead of an amendment of the 1863 location. As it is printed in 29 L. D. 44, it is not copied here. [163]

Plaintiffs' Exhibit "L."

Plaintiffs offered in evidence as Plaintiffs' Exhibit "L," a paper in words and figures following, the nature of the case requiring that it be printed in full:

United States of America, District of Columbia.

Know all men by these presents that I, John S. Watts, of the City of Santa Fe, Territory of New Mexico, and the owner of one of the unlocated floats; containing about one hundred thousand acres of land granted to the heirs of Luis Maria Baca by Act of Congress approved 21 June, 1860, as follows to wit:

Sec. 6th. And it be further enacted that it shall be lawful for the heirs of Luis Maria Baca who make claim to the same Tract of Land as is claimed by the town of Las Vegas, to select instead of land claimed by them, an equal quantity of vacant land not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number, and it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land so selected by said Heirs of Baca whenever thereunto required by them: Provided, however that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act and no longer.

Be it further known that the said John S. Watts has full power and authority to make the location of said Heirs under said act, and cause to be made a title in Fee for the same after such proper location and survey. [164]

Now therefore be it further known that I, the said John S. Watts, have this day sold to Wm. Wrightson of the City of Cincinnati, State of Ohio, the said unlocated tract, with all its privileges, for and in consideration of the Sum of One Hundred and Ten Thousand Dollars, the receipt whereby is hereby acknowledged and I hereby bind myself, my heirs, executors or administrators to make a full and complete Title in Fee Simple for said land to said William Wrightson, his assigns or legal representatives whenever thereunto required.

And I, the said John S. Watts, hereby authorize and empower the said W. Wrightson to make the location under the said act in as full and ample manner as the said heirs could do the same.

Witness my hand and seal in the City of Washington, the second day of March, Anno Domini 1863.

JOHN S. WATTS. (Seal)

Witness:

JOHN S. HOLLINGHEAD. JOHN D. BLOOR.

Five and Twenty Cents Revenue Stamps, U. S. A. District of Columbia,

City and County of Washington.

On this eighth day of February in the year of our Lord, one thousand eight hundred and sixty-four before me, the subscribed John S. Hollinghead, a Notary Public in and for the County of Washington and District of Columbia, duly commissioned, qualified and authorized to take the acknowledgment of deeds, etc., in said District according to the laws therefor, personally [165] appeared John S. Watts who is personally known to me to be the individual described in and who executed the foregoing instrument of writing and he acknowledged the

same to be his act and deed for the purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal at my office in the City of Washington and District aforesaid this 8th day of February, 1864.

[Notarial Seal.]

JOHN S. HOLLINGHEAD, Notary Public.

Five Cent U. S. Revenue Stamp.

District of Columbia, to wit:

I, Reteun J. Meigs, Clerk of the Supreme Court of the District aforesaid do hereby certify that John S. Hollinghead who has signed and attested the foregoing Power of Attorney was at the time of said signing and attestation a Notary Public for said District duly commissioned and qualified and that his signature thereto is genuine.

In Testimony Whereof I have subscribed my name and affixed the Seal of Said Court this 8th day of February, 1864.

[Seal of the Court.]

R. J. MEIGS, Clerk of C.

5 Cent Rev Stamp. [166]

The defendants Santa Cruz Development Company and the defendants Joseph E. Wise and Lucia J. Wise, objected to the admission in evidence of said document for the following reasons: FIRST. The execution thereof in behalf of John S. Watts has not been proved. SECOND. That the purported acknowledgment thereof is not in due form, nor made

before a recognized officer. THIRD. That there is nothing in the paper to connect it with the 1863 location of Baca Float No. 3. Next, the recital is that John S. Watts was the owner at that time of one of the unlocated floats. Next, there is no allegation in the bill that there ever was any assignment of this title bond to Hawley, and the bill simply says that the plaintiffs are in possession of this paper and are entitled to its benefit. And next, this paper purports to be an assignment of a right to locate, namely, the assignment of a beneficial power in trust to Wrightson, and inasmuch as Wrightson did not execute this power in trust, but it was exercised by the grantor therein, it does not inure to the benefit of Wrightson or any of his assignees. Also on the ground that the same was immaterial, irrelevant and incompetent.

A written document between the parties, a title bond containing a description of the property cannot be admitted for the purpose of aiding or assisting in the construction of a deed made even in pursuance of that contract, unless it is in an action to reform, which they have disavowed this to be.

Also on the ground that the document tends to alter, vary and modify or contradict the deed of 1870 from John S. Watts to Christopher E. Hawley.

The instrument was received subject to the objections of the said defendants. [167]

Testimony of Samuel A. M. Syme.

Thereupon the plaintiffs called as a witness on their behalf, SAMUEL A. M. SYME, who being first duly sworn, was examined and testified as follows:

I reside in Washington, D. C. I went there in

(Testimony of Samuel A. M. Syme.)

October, 1880, and have been there ever since, except the period I lived in Alexandria, three years. I have known of Baca Float No. 3 that that property existed away back of that. I mean back of '88 or '87. I was talked to and told about it back to the time of '84 and '85. I knew John S. Watts; but it is a long time back.

(Mr. Noble, solicitor for plaintiffs, showed the witness the paper marked Plaintiffs' Exhibit "L" designated as the "Wrightson title bond.")

This is one of the papers that I delivered to Messrs. Watts and Davis. Anterior to the delivery of this paper by me to Messrs. Watts and Davis, it had been in my possession, or the possession of Capt. Mathews, to my knowledge, for several years. He got it from James Eldredge. I got this paper with the other papers from James Eldredge. This paper was among the papers delivered to me by James Eldredge. I knew James Eldredge very well. I knew that there was this kind of a relationship between him (James Eldredge) and Christopher Hawley, and what he (James Eldredge) told me himself and from what I saw in the papers, that relationship; that is all.

Question by Mr. NOBLE, for Plaintiffs.—Did you know that Eldredge had a power of attorney from Christopher Hawley?

To this question the defendant Santa Cruz Development Company objected as not calling for the best evidence; that the power of attorney itself would be the best evidence as to [168] in whose favor it

(Testimony of Samuel A. M. Syme.) ran and of the terms of it.

Mr. NOBLE.—We will offer the power of attorney in the course of the trial.

The COURT.—The objection is overruled.

To which ruling of the Court the defendant Santa Cruz Development Company then and there duly excepted.

Question by Mr. NOBLE for Plaintiffs.—You knew that James Eldredge had a power of attorney from Christopher Hawley?

A. From what he said to me and from what I saw in the papers. I saw the power of attorney connected with the deed, and that is the way I knew that, and what he told me himself. I saw the power of attorney often and copies of it often, and I knew also from my relationship with the parties that Eldredge acted under the power of attorney from Hawley.

Mr. NOBLE.—Question. Did you receive this exhibit "L" in connection with the transfer of the title to Baca Float No. 3?

To this question defendant Santa Cruz Development Company objected, as leading and calling for a conclusion.

The Court overruled the objection, to which ruling of the Court the said defendant then and there duly excepted.

WITNESS.—I received this paper in connection with a number of papers in a satchel from Mr. Eldredge. I did not see this of course, until I was examining through the papers when I found this paper, and Mr. Eldredge had delivered it to me in among

(Testimony of Samuel A. M. Syme.) the other papers with a satchel of papers.

Mr. NOBLE.—Question. I asked you the question, Colonel, whether you received this paper with the others in connection with the transfer of title to Baca Float No. 3.

To this question Santa Cruz Development Company objected [169] on the ground that it was leading. The Court overruled the objection, to which ruling of the Court, said defendant then and there duly excepted.

WITNESS.—I received that paper with the papers that I considered to be the title papers to Baca Float No. 3—a number of deeds, etc., coming from Hawley down. I received that paper in that connection and with those papers. We had all those deeds except one, I think, the deed from Hawley to Robinson. I knew where it was because I saw a letter in among the papers from Robinson, stating—writing for the deed, and I knew where that deed was—was with him from that letter, and this paper, together with other papers were received by me in connection with the transfer of Baca Float No. 3.

Cross-examination of the witness, S. A. M. Syme, by Mr. BREVILLIER, Solicitor for Defendant Santa Cruz Development Company.

WITNESS.—I think it was in the fall of 1894 or the winter of 1895 when I received those papers. I am most sure it was. I looked into the satchel to see what was in the papers as soon as I received it pretty much, the day after it or that night, just at the time almost. As soon as I received the papers I commenced going over them. Now, the deed which I received for an interest in the Baca Float No. 3 was in 1896, that is by my recollection. I have forgotten the date of the deed exactly, but to my recollection it was about that time.

Thereupon the defendant Santa Cruz Development Company moved the Court to strike out the testimony of the witness with reference to any statement that the papers were delivered to him during the course of the title, as he fixed the delivery to him in 1894, and the date of his deed in 1896, and the capacity in which he received the papers has not been shown; [170] it may have been as bailee for some one. Furthermore, I assert now, and I believe it will not be contradicted that Christopher E. Hawley, by James Eldredge, his attorney in fact, conveyed his interest in Baca Float No. 3 to John C. Robinson in the year 1884 or 1885, and this is something that was done by Eldredge, whose connection with the title at that time is not shown, ten years or more thereafter. It is not part of any res gestae. It has nothing to do with the transaction. The witness was not a grantee, was not a person interested in the title, nor was Eldredge.

The motion was denied by the Court and thereupon said defendant then and there duly excepted to the ruling of the Court.

Plaintiffs' Exhibit "M."

Plaintiffs offered in evidence as Plaintiffs' Exhibit "M," under the stipulation as to the record in Lane v. Watts, letter in the words and figures following,

the nature of the case requiring that it be printed in full:

"Santa Fe, New Mexico, March 27, 1864. W. Wrightson, Esq.,

Dear Sir: You will please find enclosed the Certificate of the Register and Receiver that the location made in Arizona is vacant and not mineral so far as the records of their office show. I hope this certificate will enable you to get the location confirmed.

With kind regards, I remain,

Yours,
JOHN S. WATTS."

[Endorsed]: 137,373. Received at the Gen. Land Office, Washington, D. C., May 26, 1864. John S. Watts, Santa Fe, N. Mex. Mar. 27/64. Encloses a Certificate of the Regr. at Santa Fe, N. M., to a Location No. 3, for the Heirs of Louis Maria Cabeza de Baca, in Arizona. File With the Case. Hawes.

To the introduction in evidence of this letter, the defendants Santa Cruz Development Company and Joseph E. [171] Wise and Lucia J. Wise objected that there was no stipulation between the parties hereto which authorized plaintiffs to introduce a mere copy of said alleged letter; that the stipulation heretofore entered into in regard to the introduction of evidence only covered letters from officials of the United States Government, and did not cover letters between private individuals; therefore, that they objected to the introduction of the alleged private correspondence, and on the further ground that the said alleged paper is incompetent, irrelevant and imma-

terial, and has no bearing on the issues herein.

The objection of said defendants was everruled by the Court, to which ruling of the Court the said defendants then and there duly excepted.

Mr. Brevillier, counsel for Santa Cruz Development Company, asked counsel for plaintiffs if he offered the endorsements on Plaintiffs' Exhibit "M" that were made by N. Hawes, to which counsel for plaintiffs stated that they did.

Thereupon the Santa Cruz Development Company objected to the introduction in evidence of said endorsements on said letter as being immaterial, incompetent and irrelevant, an endorsement on a paper made at some unascertained time by some clerk of the land office.

The Court overruled the objection and thereupon the said defendant duly excepted to said ruling of the Court.

Plaintiffs' Exhibit "P."

Plaintiffs then introduced in evidence without objection as Plaintiffs' Exhibit "P," a letter dated December 2, 1914, addressed to the Commissioner of the General Land Office by the First Assistant Secretary of the Interior, directing the Commissioner, in accordance with the mandate of the Supreme [172] Court, to file the Contzen survey, and transmitting the Contzen survey.

Plaintiffs' Exhibit "Q."

Plaintiffs introduced in evidence without objection, as Plaintiffs' Exhibit "Q," the plat of the Contzen survey referred to in the letter from the First Assistant Secretary of the Interior to the Commis-

sioner of the General Land Office, of date December 2, 1914. The original map so introduced in evidence, is, by order of the Court and stipulation of the parties, transmitted with the record, and therefore no copy is annexed hereto.

Plaintiffs' Exhibit "R."

Plaintiffs then introduced in evidence without objection, as Plaintiffs' Exhibit "R," certified copy of a letter from the Assistant Commissioner of the General Land Office to the Secretary of the Interior, dated December 14, 1914, stating, that in compliance with the letter of December 2, 1914, the Contzen survey, with the accompanying field notes had been filed and transmitted to the local land office.

Plaintiffs then introduced in evidence the originals or certified copies of the following deeds through which they deraign their title:

Plaintiffs' Exhibit "N."

A deed in words and figures following, the nature of the case requiring that it be printed in full:

This indenture made the eighth day of January, in the year one thousand eight hundred and seventy, between John S. [173] Watts of Santa Fe in the Territory of New Mexico, U. S. A., party of the first part and Christopher E. Hawley of Wilkesbarre, in the State of Pennsylvania, U. S. A., party of the second part, Witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar and other valuable consideration, lawful money of the United States of America, to me in hand paid by the party of the second part, at or before the ensealing and delivery of these presents,

the receipt whereof is hereby acknowledged, has remised, released and quitclaimed, and by these presents do remise, release and quitclaim unto the said party of the second part, and to his heirs and assigns. forever, All that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the Territory of Arizona, U.S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864, Bounded and described as follows: Beginning at a point three miles West by South from the building known as the Hacienda de Santa Rita, running thence north twelve miles thirty-six chains and forty-four links, running thence east twelve miles, thirty-six chains and fortyfour links, thence south twelve miles, thirty-six chains and forty-four links, thence west twelve miles, thirty-six chains and forty-four links, to the point or place of beginning: The said tract of land being known as Location No. 3 of the Baca Series, Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, [174] and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; And also the estate, right title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above-described premises, and every part and parcel thereof, with the appurtenances; To have and to hold all and singular

the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN S. WATTS. (Seal)

Sealed and delivered in the presence of

WM. H. CLARKSON.
CHARLES NETTLETON.

State of New York,
City and County of New York,—ss.

Be it remembered that on this 8th day of January, A. D. 1870, before me, Charles Nettleton, a Commissioner of the Territory of Arizona, in and for the State of New York, duly appointed and commissioned by the Governor of said Territory, duly sworn and dwelling in said city of New York, personally appeared John S. Watts, personally known to me to be the same person described in and who executed the within Instrument of writing, who acknowledged to me that he had executed the same for the uses and purposes therein mentioned, and that the same was his free and voluntary act and deed. [175]

In Witness Whereof I have hereunto set my hand and affixed my official seal.

(Official Seal) CHARLES NETTLETON, Commissioner for Arizona in New York.

State of New York,

City and County of New York,—ss.

Be it remembered that on this 8th day of January, A. D. 1870, before me, Charles Nettleton, a Notary

Public in and for the City, County and State of New York, duly commissioned and sworn, and dwelling in the said city of New York, personally came John S. Watts, to me personally know to be the same person described in and who executed the within Instrument, who signed and sealed the same in my presence, and acknowledged to me that he executed the same as his act and deed, freely and voluntarily, and for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal.

CHARLES NETTLETON,

Notary Public in and for the City and County of New York, State of New York.

Vu au Consulat general de France aux Etats Unis pour legalization de la signature ci dessus de Mr. Charles Nettleton, Notaire Public pour et dans la ville et l'Etat de New York.

New York, le 8 Janvier, 1870, pour le Consul gerant le Consulat general compeche et par delegation Le Chancelier.

(Official Seal)

G. ROUHAUD.

Recorded May 9, 1885, Pima County, Arizona.

Translation of Certificate.

Certified at the Consulate General of France in the United States to be the genuine signature of Mr. Charles Nettleson, Notary Public for and in the city and State of New York.

New York, Jan. 8, 1870, for the acting Consul, the Consul General being absent, and by delegation the chancellor. [176]

Plaintiffs' Exhibit "O."

Deed in words and figures following, the nature of the case requiring that it be printed in full:

United States of America, Territory of New Mexico, County of Santa Ana,

Know all men by these presents that we, by our attorney Tomas Cabeza de Baca duly authorized to execute deed for us, Luis Baca, resident of Los Alamos, San Miguel County, New Mexico; Prudencio Baca, resident of Loma Parda in Mora County, New Mexico, We, Jesus Baca, Tomas Cabeza de Baca, Encarnacion Baca, wife of Manuel Viscara, Josefa Baca, wife of Demetrio de Lao, Jose Baca, Tomas Baca 2nd, Trinidad Baca, wife of Fernando Delgado, Altagracia Baca, wife of Patricio Silva, all children of Juan Antonio Baca deceased, a son of Luis Maria Baca, deceased; We, Francisco Silva, Isabel Silva, wife of Vincente Arnujo, Jesus Maria Silva, Benito Silva and Manuel Silva, children of Cesaria Baca, deceased, who was a daughter of Juan Antonio Baca, deceased, who was son of Luis Maria Baca, deceased; We, Isabel Baca, wife of Jose Doroteo Sina, David Baca, Santiago Baca, Maria Baca, wife of Jesus Ma. Critz, children of Dominigo Baca, deceased, son of Juan Antonio Baca, deceased, son of Luis Ma. Baca, deceased; We, Eliza, Refugia and Siria Salazer, children of Nicolasa Baca, wife of Tomas Salazar and daughter of Juan Anto Baca, deceased, and son of Luis Ma. Baca, deceased; We, Antonio Baca, Felipa Baca, wife of Jose Baca, Jesus

Ma. Baca, Fernando Baca, Josefa Baca, wife of Jesus Baca, Polonia Baca, wife of Perdo Archireque and Fransisco Baca, children of Jose Baca, deceased, son of Luis Ma. Baca, deceased; I, Diego Baca, son of Miguel Baca, deceased, son of Luis Maria Baca, deceased; We, Luis Maria Baca, Alexandro Baca, Juan de Dios Baca and Martin Baca, children of Mateo [177] Baca, deceased, son of Luis Ma. Baca, deceased; We, Antonio Trujillo, Maria Josefa Trujillo, wife of Cesario Ramirez, Andres Trujillo, Juana Trujillo, children of Guadalupe Baca, deceased, wife of Santiago Trujillo and daughter of Luis Maria Baca, deceased; We, Josefa Lopez, wife of Nicolas Arnujo and daughter of Feliciana Trujillo, deceased, daughter of Guadalupe Baca, deceased, daughter of Luis Maria Baca, deceased; Mateo Lopez, son of Feliciana Trujillo, Altagracia Lopez, wife of Francisco Ramirez and daughter of said Feliciana Trujillo, Jesus Ma. Trujillo, son of Guadalupe Trujillo, deceased, who was daughter of Guadalupe Baca, deceased daughter of Luis Ma. Baca, deceased; I, Antonio Montoya, son of Josefa Baca y Sanchez, deceased, and wife of Juan Luis Montoya; We, Antonio Garcia, Francisco Garcia, Maria Ynez Garcia, Juan Ma. Garcia and Maria de los Angelos Garcia, children of Juana Paula Baca, deceased, daughter of Luis Maria Baca, deceased, and wife of Jose Garcia; We, Juliana Baca, Francequita Baca, Siguro Baca, Jose Baca, Sotero Baca and Aumaldo Baca, children of Felipe Baca, deceased; We, Luis Baca, Nestor Baca, Guadalupe Baca, Francisco Baca and Julian Baca, children of Jesus Baca y Lucero

1st deceased, son of Luis Maria Baca, deceased; I, Tomas Cabeza de Baca owner by purchase and convevance of the interest and claim of Manuel Baca, son of Luis Maria Baca in and to the lands of Luis Ma. Baca, deceased, as will appear by deed of conveyance executed the 17th day of June, 1861, and duly recorded in the Record Book of the Register of Deeds for Santa Ana County, Letter "D" pages 6 and 7; and I, Tomas Cabeza de Baca owner by purchase and conveyance of the interest of Ygnacio Baca, only son of Ramon Baca deceased, son of Luis Ma. Baca deceased, [178] as will appear by Deed of said Ygnacio Baca and Maria Guadalupe Hurtado his wife to said Tomas C. de Baca on the 1st day of June, 1861, and duly recorded in Record Book "D" of Deeds for Santa Ana County, pages 5 and 6; I, Tomas Cabeza de Baca owner by purchase and conveyance of the interest of Maria Altagracia Baca, whose real name is Maria de Jesus Baca, wife of Francisco Martinez, daughter of Luis Ma. Baca deceased, as appears by deed of 14th November, 1864, recorded in Book "D" pages 17 and 18, of the Records of Santa Ana County, Territory of New Mexico; I, Tomas Cabeza de Baca, owner by purchase and conveyance of the interest of Rosa Baca deceased, as appears by deed of Josefa Salas and Jose Martinez, her husband, made 22d day of May, 1864, duly recorded in book D, pages 13 and 14 of the Records of Santa Ana County in the Territory of New Mexico, on the 23d day of May, 1864; I, Jesus Maria Cabeza de Baca both as heir and owner by purchase and conveyance of the interest of Jesus

Maria Baca y Lucero 2nd, and Maria Rafaelo Arnujo, his wife, as appears by deed of the 20th of August, 1861, duly recorded in the records of Santa Ana County, New Mexico, in Record Book "D" page 12 of said Record; I, Francisco Baca both as heir and as owner by purchase and conveyance of the interest of Domingo Baca and Rosalia Garcia, his wife, on the 19th day of February, 1865, and duly recorded in book "D" of the Records of Santa Ana County, New Mexico, pages 18 and 19.

All of us for and in consideration of the sum of Six thousand and eight hundred dollars, paid by John S. Watts to Tomas Cabeza de Baca, Agent and attorney in fact of the heirs of Luis Maria Baca deceased, have bargained, sold and conveyed, and do by these presents bargain, sell and convey to John S. Watts, his heirs and assigns forever, the following described tract of land, situate in the Territory of Arizona and bounded as follows, to wit: Beginning at the [179] head of Francis Creek at a certain monument erected by John Moss on his trail from Fort Mohave to Prescott in the year 1864, near the large black or burnt mountain, said Francis Creek being one of the tributaries of Bill Williams Fork, commencing at said monument for a centre of the west line, and running from said centre north six miles and eighteen 22/100 chains, thence east twelve miles and thirty-six 44/100 chains, thence south twelve miles and thirty-six 44/100 chains, thence west six miles and eighteen 22/100 chains, which said tract of land contains ninety-nine thousand two hundred and eighty-nine 39/100 acres

(99,289 39/100) and which said land was duly located in the office of the Surveyor General of the Territory of New Mexico by the said heirs of Luis Maria Baca in accordance with the provisions of the Sixth Section of an Act of Congress passed June 21, 1860, entitled "An Act to confirm certain private land claims in New Mexico," and found in Volume 12, page 71 of the United States Statutes at Large, the said location being known as Number Five.

To have and to hold the said lands to the said John S. Watts, his heirs and assigns forever, free from all claims of ourselves as heirs of Luis Maria Baca, deceased, and of all persons claiming by, through, or under us, together with all the privileges and appurtenances to the said land belonging and the said heirs of the said Luis Maria Baca, and the said Tomas Cabeza de Baca as owner and as the attorney in fact of the said heirs of Louis Maria Baca deceased, now covenant and agree with the said John S. Watts, his heirs and assigns as follows:

First. That they are the sole lawful heirs of Luis Maria Baca; that they are seized in fee of said land and have good right and title to the same and authority to sell [180] and dispose of the same; that said land is free from all incumbrances resulting from them.

Second. That the said John S. Watts, his heirs and assigns shall quietly enjoy the possession of said land free from all claim or demands of the said heirs of Luis Ma. Baca, their heirs, executors, administrators and assigns.

Third. That we will defend and protect the title of the said John S. Watts, his heirs and assigns, to

the said lands against all claims and demands arising through or under us as heirs of the said Luis Maria Baca, deceased, or under persons claiming to be heirs of Luis Ma. Baca, deceased; and that the said John S. Watts, his heirs and assigns shall have and hold said lands in as full perfect and ample a manner as the said heirs of Luis Ma. Baca, deceased, had and held said lands just before the execution of said conveyance; and the said heirs of Luis Ma. Baca, above mentioned, now ratify and confirm the title made by us by our attorney, Tomas Cabeza de Baca to John S. Watts, his heirs and assigns on the 1st day of May, 1864, for the lands described in Location Number two, Situate on the Canadian River in San Miguel County, New Mexico, and Location Number Four Situate in Saguatch County, Colorado Territory, and Location Number three, situate in Arizona Territory, containing each 99,289 39/100 acres, the boundaries of which are set forth and described in said deed; and the said heirs of the said Luis Maria Baca, deceased, executing this deed as herein set forth, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1st, 1864, mentioned and described.

WITNESS our hands and seals of our said [181] attorney, Tomas Cabeza de Baca, this 30th day of May, A. D. 1871.

TOMAS C. DE BACA, (Seal)

per LUIS BACA.

POLONIO BACA, (Seal)

FRANCISCO BACA, (Seal)

per PRUDENCIO BACA.

Cornelius C. Watts et	al. 203
EVEDERO DE JOSE BACA	(Seal)
FINADO	(,0 000)
TOMAS C. DE BACA,	(Seal)
per DIEGO BACA,	(Seal)
EVIDORO DE MIGUEL BACA	
TOMAS C. DE BACA,	(Seal)
per LUIS MARIA BACA.	
ALEXANDRO BACA,	(Seal)
JUAN DE DIOS BACA,	(Seal)
MARTIN BACA EVEDERAS,	(Seal)
DE MATEO BACA FINADO,	
TOMAS C. DE BACA,	(Seal)
per BENITO SILVA.	
ANTONIO TRUJILLO,	(Seal)
MARIA JOSEFA TRUJILLO,	(Seal)
ANDRES TRUJILLO,	(Seal)
JUANA TRUJILLO,	(Seal)
FELICIANA TRUJILLO,	(Seal)
GUADALUPE TRUJILLO,	(Seal)
JOSEFA LOPEZ,	(Seal)
MATEO LOPEZ,	(Seal)
ALTAGRACIA LOPEZ,	(Seal)
JESUS MARIA TRUJILLO,	(Seal)
TODAS EVEDERAS DE	GUADALUPE
BACA,	
TOMAS C. DE BACA,	(Seal)
per JOSEFA BACA.	
ANTONIO MONTOYA,	(Seal)
TOMAS DE BACA,	(Seal)
per PRUDENCIO BACA.	
TOMAS C. DE BACA,	(Seal)
per JESUS BACA.	
ENCARNACION BACA,	(Seal)

204 Joseph E. Wise and Lucia J. Wise vs.

JOSEFA BACA,	(Seal)			
JOSE BACA,	(Seal)			
TOMAS BACA,	(Seal)			
TRINIDAD BACA,	(Seal)			
ALVAGRACIA BACA,	(Seal)			
FRANCO SILVA,	(Seal)			
ISABEL SILVA,	(Seal)			
JESUS MA. SILVA Y BACA,	(Seal)			
MANUEL SILVA,	(Seal)			
ISABEL BACA,	(Seal)			
DAVID BACA,	(Seal)			
SANTIAGO BACA,	(Seal)			
EULALIO BACA,	(Seal)			
ELISA SALAZA,	(Seal)			
SIRIA SALAZA,	(Seal)			
REFUGIA SALAZAR,	(Seal)			
EVEDERAS DEL FINADO,	(Seal)			
JUAN ANT. C. DE BACA TOMA	AS C. DE			
BACA,				
ANT. BACA,	(Seal)			
JESUS MA. BACA,	(Seal)			
[182]				
TOMAS C. DE BACA,				
LUIS BACA,	(Seal)			
NESTOR BACA,	(Seal)			
GUADALUPE BACA,	(Seal)			
FRANCO BACA,	(Seal)			
JULIAN BACA,	(Seal)			
EVEDERAS DE JESUS BACA TODOS EVE-				
DERAS DE JUANA FINADO) PAULA			
BACA,				
TOMAS C. DE BACA,	(Seal)			

DUENO	DEL	INTERESO	DE	MANUEL
BAC	A,			

YONO BACA,

MA. ALTAGRACIA BACA,

JOSEFA SALAS.

FRANCO BACA, (Seal)

EVEDERAS DE JOSEFA BACA y SAN-CHEZ FERNANDO BACA, (Seal)

TOMAS C. DE BACA, (Seal)

per ANT. GARCIA.

FRANCO GARCIA, (Seal)

MA. YNEZ GARCIA, (Seal)

JUAN MA. GARCIA, (Seal)

MA. DE LOS ANGELOS GARCIA, (Seal)

TOMAS C. DE BACA,

per JULIAN BACA. (Seal)

BRANCA BACA, (Seal)

SEGUIRO BACA, (Seal)

JOSE BACA, (Seal)

SOTERO BACA, (Seal)

ROMALDO BACA, (Seal)

Dueno del interesode Donigo Baca todo hijos A. Felipe.

JESUS BACA Y GALLEJOS, (Seal) BACA FINADO.

Dueno del intereso de Jusus Baca 2nd.

Testigo Bernabe Baca, Carlos Conklin.

United States of America,

Territory of New Mexico,

County of Santa Ana,—ss.

This day personally appeared before me, Bernati Baca, clerk of the Probate Court in and for said county and territory, the above-named Tomas

Cabeza de Baca, Francesco Baca and Jesus Baca, the above-named grantors and as attorney of the heirs of Luis Maria Baca, deceased, to me well known to be the identical persons whose names are signed to [183] the foregoing deed of conveyance, and in my presence acknowledged the execution of the same to be their voluntary act and deed for the purpose therein mentioned, and I further certify that the interlineations on Page 1 between the lines 11 and 12 from the bottom in these words "We Elisa, Refugia and Siria Salazar, children of Nicolasa Baca, wife of Tomas Salazar and daughter of John Antonio Garcia, deceased, son of Luis Ma. Baca, deceased, was made before the execution of said deed.

WITNESS my hand and private seal, their being no official seal of said Court, at Pena Blanca this 30th day of May, A. D., 1871.

BARNATI BACA, (Seal) Escribano de la cortedo Pricetas.

United States of America, Territory of New Mexico.

I, Henry Wetter, Secretary of the Territory of New Mexico, certify that Barnati Baca Esq., who signed the foregoing was at the date thereof clerk of the Probate Court for Santa Ana County, the above is his genuine signature and all his official acts as such are entitled to full faith and credit. The Probate Court of Santa Ana County has no official seal.

In testimony whereof I hereunto set my hand and affix the great seal of the Territory of Santa Fe, N.

M., this 1st day of June, A. D. 1871.

(Signed) H. WETTER, Secy. New Mexico.

Recorded in Yavapai County, Arizona, on May 31, 1872, in Santa Cruz County, Arizona, Feb. 1, 1915. [184]

Plaintiffs' Exhibit "S."

Power of attorney from Christopher E. Hawley to James Eldredge dated and acknowledged January 13, 1870, giving said Eldredge power to sell, dispose of and convey:

"All my right, title and interest in all that certain tract, parcel or piece of land containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs to John S. Watts of Santa Fe in the Territory of New Mexico, United States of America, by deed dated the 1st day of May, A. D., 1864, and by the said Watts conveyed to me by deed dated the eighth day of January, 1870, bounded and described as follows:

Beginning at a point three miles west by south of the building known as Hacienda de Santa Rita, running hence north twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence east twelve miles, thirty-six chains and forty-four links, to the point or place of beginning, the said tract of land being known as location No. 3 of the Baca series. For more particularlar description of which reference is had to said conveyance."

Recorded in the office of the County Recorder of Pima County, Arizona, May 9, 1885.

Plaintiffs' Exhibit "T."

Deed dated and acknowledged May 5, 1884, recorded in Pima County, Arizona, May 9, 1885, from Christopher E. Hawley by James Eldredge, his attorney in fact to John C. Robinson in words and figures following, to wit: [185]

This conveyance made this 5th day of May, A. D., 1884, between Christopher E. Hawley, of Pennsylvania, by James Eldredge of New York, his attorney in fact, of the first part, and John C. Robinson of *Binghamton*, New York, of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of One Dollar paid to the said party of the first part, by the said Robinson, the receipt of which is hereby acknowledged, and for other valuable considerations, has sold and conveyed, and by these presents does sell and convey unto the said party of the second part, and to his heirs and assigns forever, all of his right, title and interest whatever the same may be, in and to that certain tract of land situate, lying and being in the Santa Rita Mountains in the Territory of Arizona, containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States, and by said heirs conveyed to John S. Watts of the Territory of New Mexico, by deed dated on the first day of May, A. D., 1864, and by said Watts conveyed to the said Christopher E. Hawley by deed dated on the eighth day of January, A. D., 1870, bounded and described as follows:

Beginning at a point three (3) miles west by south from the building known as the Hacienda de Santa Rita, running thence north twelve miles, thirty-six chains and forty-four links, running thence east twelve miles, thirty-six chains and forty-four links; running thence south twelve miles, thirty-six chains and forty-four links, running thence west twelve miles, thirty-six chains and forty-four links, to the place of beginning. The said tract of land being known as Location No. 3 of the Baca series, together with all and singular the [186] tenements, hereditaments and appurtenances thereunto belonging, and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, in and to the above-described premises and every part and parcel thereof, with the appurtenances, including in this conveyance all the rights and claims of the heirs of said Baca, or of those persons claiming under them, that is to say, all the right, title and interest of the said party of the first part to said location, or to any location elsewhere, under the act of Congress approved June 21st, 1860, or under any decision of any Department of the Government, made or hereafter to be made, or act of Congress passed, or to be passed.

TO HAVE AND TO HOLD, said claims and rights and all and singular the above-mentioned and described premises unto the said party of the second part, his heirs and assigns forever.

This conveyance is made under and by virtue of a power of attorney made and executed by the said Christopher E. Hawley to the said James Eldredge, authorizing him to negotiate, sell and dispose of and convey all of the right, title, and interest of said Hawley in said above-described property, which said power of attorney was executed in the city of New York, on the thirteenth day of January, A. D., 1870, and was duly acknowledged on the same date before Charles Nettleton, Notary Public.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal on the day and year first above written.

CHRISTOPHER E. HAWLEY, (Seal)
By JAMES ELDREDGE,
His Atty. in Fact.

In the Presence of:

JOHN E. BEALL. [187]

Plaintiffs' Exhibit "U."

Deed from John C. Robinson to Alex F. Mathews, dated the 22d of September, 1893, acknowledged September 25, 1893, recorded in Pima County, Arizona, October 12, 1893, in words and figures following:

"This deed of assignment made this the 22d day of September, 1893, between John C. Robinson of Binghampton, New York, party of the first part, and Alex F. Mathews, of Lewisburg, West Virginia, party of the second part. Whereas, the said John C. Robinson, by deed dated December 1, 1893, and recorded in the office of the County Recorder of Pima County, Arizona Territory, did convey to John W. Cameron of Washington, D. C., a certain tract of land in said County and Territory, which is described as follows, viz.: That certain tract of land which is the southern

half of the tract of land known as Baca Float No. 3. containing 100,000 acres, more or less, the said southern half thereby conveyed by said Robinson to said Cameron containing 50,000 acres more or less, and is bounded as follows, viz.: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, eighteen chains and twenty-two links, thence east twelve miles, thirty-six chains and forty-four links, thence south six miles, eighteen chains and twenty-two links, thence west twelve miles, thirtysix chains and forty-four links, to the beginning, together with all the tenements and appurtenances thereunto belonging, and whereas, by virtue of and as appears by a certain declaration of trust executed by the said John W. Cameron, dated the 28th day of November, 1892, and recorded in said office, and especially by the fourth (4th) section of paragraph of said declaration of trust, I am entitled to have and recover and to have paid to me [188] by the said Cameron ten (10) per centum of the money to be realized net by said Cameron from the sale of said land when by him sold, and whereas, out of said net proceeds of such sale a note of \$250.00 held by the Broom County National Bank of New York, on which I am endorser, is to be paid, and whereas, as such endorser, I have now taken up and hold said note, and whereas I have sold and desire now to assign and convey unto the said Alex F. Mathews all of my right, title and interest in and to said land above described, and to the net proceeds thereof, for my benefit, to the extent of the said ten per cent

and for my indemnity as endorser on said note, by virtue of the said declaration of trust or otherwise. Now this deed witnesseth, that for and in consideration of the premises and in further consideration of the sum of Ten (10) Dollars to me in hand paid, the receipt whereof is hereby acknowledged, I, the said John C. Robinson, party of the first part, do hereby grant and convey and assign to the said Alex F. Mathews without recourse upon me whatsoever, all of my right, title and interest in and to said land above described, and to the net proceeds thereof, by virtue of the said declaration of trust or otherwise, and I do hereby authorize the said John W. Cameron to convey and grant the said above-described tract of land of 50,000 in Pima County, Arizona Territory, to the said Alex F. Mathews, free from any and all claims, demands and interest on my part therein, or in the net proceeds thereof in and under the said declaration of trust or in any manner, in any way or upon any ground whatever. And I hereby release, acquit and discharge the said Cameron from the application of any part of the net proceeds of said sale to the payment of said note of \$250, upon which I am endorser, which has been paid and taken up by me and which I herewith surrender and turn over cancelled to the said Alex F. Mathews as witness the following signature and seal:

JNO. C. ROBINSON. (Seal) [189] Plaintiffs' Exhibit "V."

Quitclaim deed from John C. Robinson to Samuel A. M. Syme, dated and acknowledged the 30th day of April, 1896, and recorded in Pima County, Ari-

zona, September 25, 1896, in words and figures following, to wit:

"This deed made the 30th day of April, 1896, between Jno, C. Robinson of Binghampton, New York, party of the first part, and S. A. M. Syme, of Washington, D. C., party of the second part:

WITNESSETH: That the said party of the first part, in consideration of the sum of Five Dollars in hand paid, doth hereby remise, release, quitclaim and convey to the said party of the second part, all his right, title and interest, both in law and in equity in and to a certain tract or body of land situate in Pima County, in the Territory of Arizona, containing some fifty thousand (50,000) acres, more or less, and described as follows, viz.:

The upper or north one-half of the tract of land of some 100,000 acres, more or less, known as Bac Location or Baca Float No. 3, bounded as follows: Beginning at a point six (6) miles eighteen (18) chains and twenty-two (22) links north of a point three miles west by south from the building known as the Hacienda de Santa Rita, thence from said beginning point north 6 miles, 18 chains and 22 links; thence east 12 miles, 36 chains and 44 links; thence south 6 miles, 18 chains and 22 links; thence west 12 miles, 36 chains and 44 links to the beginning.

As witness the following signature and seal:

JNO. C. ROBINSON. (Seal)

Witness:

EDGAR E. BROOKS. [190]

Plaintiffs' Exhibit "W."

Deed from Samuel A. M. Syme and Laura G. Mathews, Eliza Patton Mathews, Mason Mathews, Charles G. Mathews and Henry A. Mathews, devisees of Alexander F. Mathews, deceased, acting in their individual capacity, and the said Mason Mathews, Charles G. Mathews and Henry A. Mathews, acting in their capacity of executors of the will of Alexander F. Mathews, deceased, as grantors, to C. C. Watts and D. C. T. Davis, Jr., Trustees, dated February 8, 1907, acknowledged Feb. 8, and 11, 1907, and recorded March 20, 1914, and which without the statement of parties, signatures and acknowledgments, reads as follows:

WITNESSETH: That for and in consideration of the sum of four thousand dollars in money and other valuable considerations paid and to be paid by the parties of the second part, to the parties of the first part, the receipt whereof is hereby acknowledged, the said parties of the first part have bargained, sold and do hereby grant and convey with covenants of special warranty unto the parties of the second part, their successors and assigns forever, all that certain tract or parcel of land [191] all their right, title and interest, both legal and equitable, therein, situate, lying and being in the counties of Pima and Santa Cruz, in the Territory of Arizona, known as Baca Float No. 3, and granted to the heirs of Luis Maria Baca, by the United States, by act of Congress approved June 21, 1860, and afterwards conveyed by the said Baca heirs to John

S. Watts by deed bearing date the 1st day of May, 1864, and recorded May 14, 1864, in the office of the Court of Pruebas of the county of Santa Fe, Territory of New Mexico, in book "C," at pages in said book marked 551, 552, 553, 554 and 555, and also recorded in the office of the Court of Pruebas of the county of San Miguel, Territory of New Mexico in the 3d book of Documents at pages marked 51, 52, 53, 54, 55, 56, 57 and 58, August 24th, 1866, and bounded and described as follows: Commencing at a point one and a half miles from the base of the Salero Mountain in a direction north, forty-five degrees east, of the highest point of said mountain, running thence from said beginning point west, twelve miles thirty-six chains, and forty-four links, thence south twelve miles thirty-six chains and fortyfour links, thence east twelve miles thirty-six chains and forty-four links, thence north twelve miles thirty-six chains and forty-four links, to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less; the said tract of land being known as Baca Float No. 3, including in this conveyance all the rights and claims of the heirs of the said Baca, and of all persons claiming under them, that is to say, all the right, title and interest of the said parties of the first part to said Baca Float No. 3, as above described or to any land located elsewhere in lieu thereof, under [192] act of Congress approved on June 21st, 1860, or under any decision of any department of the Government made or hereafter to be made or act of Congress passed or to be passed.

This conveyance is made with the express power to the said parties of the second part to sell and convey, to lease, mortgage or otherwise dispose of the said real estate or any part thereof, as to them may seem best, and the purchaser or purchasers in case of such sale shall not be required to see to the application or disposition of the purchase money, and shall be held acquit of any responsibility.

It is further covenanted and agreed that the parties of the first part will give to the parties of the second part such other and further deeds and assurances as in their judgment be necessary to carry into effect the provisions of this deed.

Plaintiffs' Exhibit "X."

Deed from Powhatan W. Bouldin, Lucy Bouldin and James E. Bouldin, by their attorney in fact, D. W. Bouldin, to John C. Robinson, dated and acknowledged November 12, 1892, recorded December 20, 1892, in Pima County, Arizona, and which without the acknowledgment is in words and figures following:

THIS INDENTURE, made this twelfth day of November, A. D. 1892, between John C. Robinson of Binghampton, New York, party of the first and D. W. Bouldin, attorney in fact for his sons Powhatan W. Bouldin, and his wife Lucy Bouldin, and James W. Bouldin, all of Austin, Texas, parties of the second part, Witnesseth: That Whereas, the parties of the first and second parts, by deeds exchanged between them, the said parties of the first and second parts, for the consideration therein specified, have granted and conveyed, each to the other,

their heirs and assigns (the party of the first part by deed executed at [193] Binghampton, New York, dated the twenty-eighth day of June, A. D. 1892, and the parties of the second part by deed executed at Austin, Texas, dated the twenty-second day of August, A. D. 1892) one undivided half interest in all their rights, titles, property, claims and demands whatspever, from whatever source derived and in whatever manner acquired, in and to a certain tract of land, situate, lying and being in the Santa Rita mountains in the Territory of Arizona, containing one hundred thousand acres, be the same more or less, bounded and described as follows, viz.: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita; running thence North twelve miles, thirty-six chains and forty-four links; running thence east twelve miles, thirty-six chains and forty-four links; running thence south twelve miles, thirty-six chains and fortyfour links; running thence west twelve miles, thirtysix chains and forty-four links; to the place of beginning. The said tract of land being known as Location Number Three (3) of the Baca series; together with one undivided half interest in all and singular the tenements, hereditaments and appurtenances thereunto belonging; and also one undivided half interest of all the estate, right, title and interest, as well in law as in equity of the said parties of the first and second parts, in and to the above-described premises, and of every part and parcel thereof, in whatever manner acquired by the said parties of the first and second parts.

And this indenture further witnesseth: That in order to make a full, perfect and absolute partition of the above-described premises, and in order that each of the said parties of the first and second parts may hold their share under the above-recited deeds, in severalty, the said parties of the second part do hereby grant, assign, release and confirm to the [194] said party of the first part, his heirs and assigns forever, one half of the above-described premises, bounded and described as follows, viz.: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, eighteen chains and twenty-two links; running thence east twelve miles, thirty-six chains and forty-four links; running thence south six miles, eighteen chains and twentytwo links; running thence west twelve miles, thirtysix chains and forty-four links to the place of beginning. The said tract of land bounded and described in the sentence immediately foregoing this, being the southern half of the tract known as Location number three (3) of the Baca series, together with all and singular the tenements and appurtenances thereunto belonging, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the parties of the second part, in and to the abovedescribed premises and every part and parcel thereof, with all the appurtenances thereof. To have and to hold said claims and rights and all and singular the above-mentioned and described premises, unto the said party of the first part, his heirs and assigns forever. In Witness Whereof, the said parties of the second part have hereunto set their hands and seals the day and year first above written.

POWHATTAN W. BOULDIN,

By His Attorney in Fact,

D. W. BOULDIN. (Seal)

LUCY BOULDIN,

By Her Attorney in Fact,

D. W. BOULDIN. (Seal)

JAMES E. BOULDIN,

By His Attorney in Fact,

D. W. BOULDIN. (Seal)

In the presence of, as to D. W. Bouldin signature:

JNO. K. DONNAN.

WALTER WOODS.

Plaintiffs' Exhibit "Y."

Deed from John Ireland and Wilbur H. King to Alex F. Mathews, dated February 7, 1894, acknowledged April 16 and 18, [195] 1894, and recorded Sept, 15, 1894, and which, without the statement of the parties, signatures and acknowledgments, reads as follows:

WITNESSETH: That the said parties of the first part for and in consideration of the sum of five dollars to them [196] in hand paid the receipt whereof is hereby acknowledged, do hereby bargain, sell, grant, convey, remise and forever quitclaim to the said party of the second part all of their right, title and interest, under and by virtue of a deed executed to them by David W. Bouldin, Sr., dated February 21st, 1885, and recorded in the office of the county recorder of Pima County, Arizona Territory, in book

13, of Deeds to Real Estate, p. 140 et seq., in and to the following described tract or parcel of land in said county and territory, viz.: The southern one half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres, more or less, which said southern half hereby conveyed, released and quitclaimed contains fifty thousand (50,000) acres more or less and is bounded as follows, viz.: Beginning at a point three miles West by South from the building known as the Hacienda de Santa Rita, thence North six miles, eighteen chains and twenty-two links; thence East twelve miles, thirtysix chains and forty-four links; thence South six miles, eighteen chains and twenty-two links; thence West twelve miles, thirty-six chains and forty-four links to the beginning, which said Southern half, is part of said entire tract of 100,000 acres in the whole of which an interest was conveyed to the said John Ireland and Wilbur H. King by said deed to them from the said David W. Bouldin and as to the rest and residue of said entire tract being the upper or northern part thereof the said interest thus conveyed to the said parties of the first part still remains and stands good to them and is in no way affected or impaired by this conveyance and release of the other or Southern half or portion." [197]

Plaintiffs' Exhibit "Z."

Deed from John W. Cameron and Mrs. A. T. Belknap to Alex F. Mathews, dated September 22, 1893, acknowledged September 28, 1893, recorded October 12, 1893, in Pima County, Arizona, in words and figures following, to wit:

"This deed of assignment made this the 22d day of September, 1893, between John W. Cameron and Mrs. A. T. Belknap, both of Washington City, D. C., parties of the first part and Alex F. Mathews of Lewisburg, W. V., party of the second part:

Whereas, John C. Robinson, of Binghampton, New York, by deed dated December 1, 1892, and recorded in the office of the county recorded of Pima County, Arizona Territory, did convey to the said John W. Cameron, a certain tract of land in said county and territory, which is described as follows, viz.:

That certain tract of land which is the Southern half of the tract of land known as Baca Float No. 3. containing one hundred thousand (100,000) acres, more or less, the said southern half thereby conveyed by said Robinson to said Cameron, containing fifty thousand (50,000) acres more or less, and bounded as follows, viz.: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, eighteen chains and twenty-two links, thence east twelve miles, thirty-six chains and forty-four links, thence south six miles, eighteen chains and twentytwo links, thence west twelve miles, thirty-six chains and forty-four links, to the beginning, together with all the tenements and appurtenances thereunto belonging. And Whereas, by virtue of and as appears by a certain declaration of trust executed by the said John W. Cameron dated the 28th day of November, 1892, and recorded in the said office and especially by the 4th paragraph or section of the said declaration of trust, as the said John [198] W. Cameron in

his own right and individually and the said Mrs. A. T. Belknap are entitled to have and receive, and have paid them ten per cent of the money to be realized net by said Cameron from the sale of said land when sold by him, and Whereas, as the said John W. Cameron and Mrs. A. T. Belknap have sold and desire now to assign and convey unto the said Alex F. Mathews all of our right, title and interest in and to the said land above described and to the net proceeds thereof by virtue of the said declaration of trust or otherwise. Now this deed witnesseth, that for and in consideration of the premises and in further consideration of the sum of ten (10) dollars to us in hand paid, receipt whereof is hereby acknowledged, we, the said John W. Cameron and A. T. Belknap, parties of the first part, do hereby grant, convey and assign to the said Alex F. Mathews, party of the second part, without any resource upon us whatever, all of our right, title and interest in and to said lands above described and to the net proceeds thereof, by virtue of the said declaration of trust or otherwise, and we do hereby authorize the said John W. Cameron to convey and grant the said above-described tract of land of fifty thousand (50,000) acres in Pima County, Arizona Territory, to the said Alex F. Mathews, free from any and all claims, demands and interest on our part therein, or in the net proceeds thereof, in and under the said declaration of trust deed in any manner, in any, or upon any ground whatsoever.

As witness the following signatures and seals:

A. T. BELKNAP. (Seal)
JOHN W. CAMERON. (Seal)

Plaintiffs' Exhibit "AA."

Deed from John W. Cameron to Alexander F. Mathews, dated Sept. 25, 1893, acknowledged Sept. 30, 1893, and recorded Oct. [199] 12, 1893, conveying

"that certain tract of land situated in Pima County in Arizona Territory which is the southern one-half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres more or less, which said southern half hereby conveyed contains fifty thousand (50,000) acres more or less and is bounded as follows, viz.: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, thence North six miles, eighteen chains and twenty-two links; thence East twelve miles, thirty-six chains and fortyfour links: thence South six miles, eighteen chains and twenty-two links; thence West twelve miles, thirty-six chains and forty-four links to the beginning."

Plaintiffs' Exhibit "BB."

Deed from Charles A. Eldredge to Alex. F. Mathews, dated September 22, 1893, acknowledged September 28, 1893, and recorded October 12, 1893, in Pima County, Arizona, in words and figures following, to wit:

"This deed of assignment made this 22d day of September, 1893, between Charles A. Eldredge of Fond du Lac County, State of Wisconsin, party of the first part, and Alex. F. Mathews of Lewisburg, West Virginia, party of the second part.

Whereas, John C. Robinson of Binghampton, New York, by deed dated December 1st, 1892, and recorded in the office of the County Recorder of Pima County, Arizona Territory, did convey to John W. Cameron of Washington, D. C., a certain tract of land in said county and territory, which is described as follows, viz.: That certain tract of land which is the southern half of the tract of land known as Baca Float No. 3, containing one hundred [200]. thousand acres more or less—the said southern half hereby conveyed by said Robinson to said Cameron containing fifty thousand (50,000) acres more or less, and is bounded as follows, viz.: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, 18 chains and 22 links; thence east twelve miles, 26 chains and 44 links; thence west twelve miles, 36 chains and forty-four links to beginning, together with all the tenements and appurtenances thereto belonging; and whereas, by virtue of and as appears by a certain declaration of trust executed by the said John W. Cameron, dated the 28th day of November, 1892, and recorded in said office and especially by the fourth (4th) section or paragraph of said declaration of trust, fifteen (15%) per cent of the money to be realized net by the said Cameron from the sale of said lands is to be held by me for my benefit until a

settlement is made by me with one James Eldredge, and a certain contract between me and John C. Robinson with reference to my said interest is cancelled; and whereas, I have sold and desire now to assign and convey unto the said Alexr. F. Mathews. all my right, title and interest in and to the said lands above described and to the net proceeds thereof by virtue of the said declaration of trust, the said contract with John C. Robinson, or otherwise; and Whereas, the said settlement has been made between me and the said James Eldredge and the said contract between myself and said John C. Robinson has been cancelled and surrendered so that I am now entitled to recover and have paid to me the said fifteen (15%) per cent of the net proceeds of said land when sold by said Cameron.

Now this deed Witnesseth, that for and in consideration of the premises, and in further consideration of the sum of ten dollars (\$10) to me in hand paid the receipt whereof is hereby [201] acknowledged, I do hereby grant, convey and assign to the said Alexr. F. Mathews without any recourse whatever upon me, all of my right, title and interest in and to the said land above described, and to the net proceeds thereof by virtue of the said declaration of trust, the said contract with Robinson as aforesaid, or otherwise. And I do hereby authorize, empower and direct, so far as I am concerned and interested therein, the said John W. Cameron to convey and grant the said above-described tract of land of fifty thousand (50,000) acres in Pima County, Arizona Territory, to the said

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Alexr. F. Mathews, free from any and all claims, demands and interest on my part therein, or in the net proceeds thereof, in and under the said declaration of trust or in any manner or upon any ground whatever.

As witness the following signature and seal.

CHAS. A. ELDREDGE. (Seal)

Plaintiff's Exhibit "CC"

Deed from James Eldredge to Alex. F. Mathews, dated September 22, 1893, acknowledged September 30, 1893, and recorded Oct. 12, 1893, in Pima County, Arizona, in the same form and language, except as to the grantor, as Plaintiffs Exhibit "BB" and "U."

Plaintiffs' Exhibit "DD."

Plaintiffs then offered in evidence a declaration of trust executed by John W. Cameron, dated November 28, 1892, acknowledged December 8, 1892, and recorded December 20, 1892, in Pima County, Arizona, in words and figures following:

"Whereas, John C. Robinson, of Binghampton in the State of New York, proposed to and is about to convey to me by deed duly executed and acknowledged, the following described property, viz.: "That certain tract of land situate, lying and being [202] in the County of Pima, Arizona Territory, the same being the southern half of the tract of land known as Baca Float No. 3, containing (100,000) one hundred thousand acres more or less, the said southern one half thereof to be conveyed to me as aforesaid, containing (50,000) fifty thousand acres,

more or less, being the same conveyed in severalty to the said John C. Robinson, by deed of partition from Powhatan W. Bouldin and James E. Bouldin by D. W. Bouldin, their attorney in fact, all of Austin, Texas, and executed at Austin, Texas, and dated the (12) twelfth day of November, 1892, and which southern one half is bounded as follows:

Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, eighteen chains and twenty-two links; running thence east twelve miles, 36 chains and 44 links; running thence south six miles, 18 chains and 22 links; running thence west twelve miles, 36 chains and 44 links, to the place of beginning, together with all rights and appurtenances thereunto belonging. Now, in consideration of the premises and of the said land to be conveyed to me, as aforesaid, I do hereby publish, declare and make known that I am to and will hold the said property to be conveyed to me as aforesaid, in manner and form following—that is to say:

- 1. With the absolute right on my part to sell the said property as a whole or in parcels, at such time or times, in such manner or manners and upon such term or terms as to me may seem best and proper, without any liability or responsibility whatever upon the purchaser or purchasers thereof, or of any part or parts of the said property to see to the application to be made by me of the purchase money therefor, or of any part thereof.
- 2. With like absolute right and authority on my part to [203] grant an option or options on said

property or any part or parts thereof, in such manner or manners, for such time or times, and upon such terms as to me may seem right and proper.

3. With like absolute right and authority on my part to borrow money upon the faith and credit of such property at such times, in such sums and upon such terms as to me may seem right and proper and to secure the payment of all sums of money thus borrowed by me by mortgages or deeds of trust upon said property, without any liability or responsibility upon the part of the party or parties advancing and lending such money to see to the application and use to be made of the same. 4. Of the money realized by me net from the sale of said land and when and as realized, I am to pay ten (10) per cent thereof to the said John C. Robinson, ten (10) per cent to be retained and divided equally 5% to each, to Mrs. A. T. Belknap and myself, John W. Cameron, both of Washington, D. C.; fifteen (15) per cent to be held by me until a settlement is made between James Eldredge and Charles A. Eldredge—at which settlement a certain paper or contract held by said Charles A. Eldredge is to be cancelled; \$250 for the payment of a note for that amount, held by the Broome County National Bank of New York, on which John C. Robinson is endorser and the balance to be paid to James Eldredge or as he may in writing direct. As witness the following signature and seal this the 28th day of November, 1892.

JNO. W. CAMERON. (Seal). [204]

Plaintiffs' Exhibit "EE."

Deed from Powhatan W. Bouldin and Lucy Bouldin, his wife, and James E. Bouldin, as parties of the first part to Alex. F. Mathews as party of the second part dated the 7th day of February, 1894, acknowledged March 28, 1894 and recorded September 15, 1894, reciting *inter alia*:

"Whereas the said parties of the first part, by D. W. Bouldin their attorney-in-fact, by deed dated November 12, 1892 and recorded in the office of the County Recorder of Pima County in the Territory of Arizona, on the 20th day of December, 1892, in Book 7, Deeds Real Estate, pages 668, 669, 670, did convey to John C. Robinson a certain tract of land in said county known and described fully and accurately in said deed and which is known as the lower or southern one-half of a tract of land known as Location No. 3, of the Baca Series in the Santa Rita Mountains in said territory and county and which one half thus conveyed contains fifty thousand acres (50,000) more or less; and whereas it was the purpose and object of said deed and the intention of said parties to convey the said land to the said Robinson free and unencumbered in any way and without its being subject or liable to any abatement or reduction in any way or for any cause or reason whatever so that the said Robinson by virtue of said deed should take, own, and hold the entire amount of land, about 50,000 acres, by said deed described and conveyed and included in the metes and bounds by said deed given; and whereas it has

been suggested that said deed is not entirely adequate and sufficient to accomplish said object and purposes, as above set forth, or may not be, inasmuch [205] as Belle Bouldin, the wife of one D. W. Bouldin, Sr., who claimed an interest in said lands, did not unite in said deed or in deeds from said D. W. Bouldin to the said Powhattan W. Bouldin and Jas. E. Bouldin for said land, and from D. W. Bouldin, Sr., to David W. Bouldin, Jr., and Powhattan W. Bouldin, the first dated August 23, 1892, and recorded in said county in Deeds of real estate, page 572, et seg. in book 23 and the second dated Oct. 16, 1888, and recorded in said county in book 21, Deeds of Real Estate, pp. 134–135, and inasmuch as there is some doubt whether it was competent for Lucy Bouldin, the wife of Powhattan W. Bouldin, to unite in and execute said deed to John C. Robinson by an attorney-in-fact so as to pass and convey to him any interest which she may have had in said land by virtue of her dower rights or otherwise." And conveying: "That certain tract of land situated in Pima County in Arizona Territory, which is the southern one-half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,-000) acres, more or less, which said southern half hereby conveyed contains fifty thousand (50,000) acres, more or less and is bounded as follows, viz.: Beginning at a point three miles West by South from the building known as the Hacienda de Santa Rita, thence North six miles, eighteen chains and twenty-two links; thence East twelve miles, thirtysix chains and forty-four links; thence South six

miles eighteen chains twenty-two links; thence West twelve miles, thirty-six chains and forty-four links to the Beginning." [206]

[Testimony of George W. Atkinson, for Plaintiffs.]

George W. Atkinson was called as witness on behalf of plaintiffs, and having been first duly sworn, was examined and testified as follows:

My name is George W. Atkinson. I am in possession of this property under the terms of a lease, the property known as Baca Float No. 3; the lease being from the plaintiffs Watts and Davis, and I was in possession at and before the commencement of this action under the lease. I think I went into possession on the 13th day of June, 1914, and the lease was made according to my recollection about the 14th of June.

Cross-examination.

(By Mr. BREVILLIER.)

WITNESS.—I have been in possession of some of this property for a great many years. Mr. Joseph E. Wise occupies now and occupied in January a large part of the property. Well, I will say that I occupied the grazing lands, not the bottom lands. I occupy such agricultural lands to which I previously filed homestead entries or got patents or assignments of homestead entries or patents—lands that I bought. I believe there is one piece of land that I bought since the lease; I have done some fencing, I think in September—last year. I did not do very much fencing. I fenced in probably eighty acres of land, that is, I put the posts around the eighty acres and wire fence around part

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(Testimony of George W. Atkinson.)

of it. I think probably I put a wire fence around four or five acres and posts around the eighty acres. There is a distance of sixteen feet, I believe, between the posts. Wise has got one pasture on the Baca Float of about one thousand acres, known as the "Garden" [207] pasture. His biggest pasture is "Singuitona." Probably he has got 4,000 acres in it and a small pasture of 1,000 absolutely. He is in absolute control of that because he has got it fenced. He also uses a lot of the other grazing land; he has got cattle running on them. I did not make any sublease to Mr. Wise. I did not tell him that he might occupy those lands as tenant with me. As a matter of fact I am using more of this property now than I did before the lease was given to me. I have changed and driven from one part of the range to the other something like eleven hundred head of cattle at two different drives; but I haven't fenced it in; I did not fence it, no sir, I did not. I have paid no money directly as rent under my lease; but I have done work for Watts and Davis which when we come to settle probably I will get credit for. I signed the injunction bond in case No. 5—the Wise injunction bond. That was not part of the work. I have done some fencing for Watts and Davis; that fence that I spoke of. The four or five acres of fence and the posts around eighty acres of land; when I come to pay my cattle bill I shall deduct the bill for my fence from it. I had a man living on it, too, for the last five months. As a matter of fact, I agreed to pay pasturage there the same as I pay the Government of the United States. That was (Testimony of George W. Atkinson.) what I agreed to do.

Mr. Wise did not give his consent to my fencing that four or five acres. I didn't ask Mr. Wise's consent to do anything and I never did.

Hereupon plaintiffs rested their case. [208]

[Evidence Introduced by the Defendants, Joseph E. Wise and Lucia J. Wise.]

[Testimony of George J. Roskruge, for Defendants Wise.]

GEORGE J. ROSKRUGE was called as a witness on behalf of the defendants Wise and being first duly sworn, testified as follows:

My name is George J. Roskruge, age seventy years, place of residence Tucson, Arizona. My profession for many years has been county surveyor and Government surveyor. I have lived in Pima County, Arizona, over forty years, and I am living here now. I was county surveyor of Pima County in 1887. I was acquainted with Col. David W. Bouldin; I first met him in the summer of 1887 at At that time he had a conversation with me in regard to surveying the Baca Float. I made a survey of Baca Float No. 3 in August and September, I think, of 1887. I went out to the ground itself in 1887 with David W. Bouldin. I was on the ground with him three or four times. He was with me when I started the survey and again with me before I finished. I knew Morgan R. Wise. I remember going on the Float and seeing him. Mr. Bouldin was with me when I went to the old Hacienda; the starting point called for in the papers that

Mr. Bouldin had, and Mr. Morgan R. Wise was living there at that time, was living there at the Hacienda.

Question.—What was the full name of it, Hacienda, or did it have any further name?

A. Hacienda de—I forget now the name of it, but it is supposed to be the initial point of the grant.

Mr. KINGAN, Counsel for Plaintiffs.—If the Court please, the plaintiffs desire to make the further objection to the evidence of Mr. Roskruge in that it is irrelevant, immaterial [209] and incompetent and inadmissible for any purpose for the reason that there is but one Baca Float No. 3.

The Court thereupon ruled that the evidence will be received subject to plaintiffs' objection.

Counsel for plaintiffs thereupon duly excepted to the ruling of the Court.

The witness then continued as follows:

I recall the name of the initial point of the Baca Float No. 3 which I surveyed for Mr. Bouldin. It is "Hacienda de Santa Rita." Mr. Bouldin and myself went to the Hacienda de Santa Rita the latter end of August, 1887, and there we met Mr. Morgan R. Wise, who was living there at the time—he was living at the Hacienda de Santa Rita, and told him what we were going to do. I ascertained first whether the old Hacienda was really the Hacienda de Santa Rita, which I found to be correct, and I asked Mr. Wise, I told him that I had come there as county surveyor to make a survey of that ground for Colonel Bouldin as Baca Grant No. 3. He admitted that was the place where he was living, that

that was the Hacienda de Santa Rita, and I started from there and ran to the southeast corner as called for in the paper that was given me by Colonel Bouldin, and there I established a monument, and Colonel Bouldin was with me and some other party, I don't remember who now, of course my man, and I don't know whether Mr. Wise accompanied me or not, but there was some one there outside of my party present at the time. We erected the monument and Colonel Bouldin took up a handful of dirt, I know, and threw it to the north and south, east and west, and said that was taking possession, that is the way the Mexicans took possession of their land grants. I remember that. Then from there I ran east the twelve miles and some [210] odd chains, monumenting as I went; putting up monuments all along the line where they could be seen one from the other, so if it was ever fenced there would be no trouble in fencing it, and there I ran to the northeast corner above Greaterville and there Mr. Bouldin met me again, and I showed him where the corner was there where I put in a post. At the four corners of the Grant I established a corner, and between I put in monuments all along the line where they could be seen looking forward and back-sight, so in fencing there would be no trouble. I made a map of my survey about that time. I made the map when I came back and put it on record. Colonel Bouldin wanted to have it put on record because he said the county surveyor was the next authority after the Government. He

couldn't have it surveyed by the Government and he wanted it surveyed by the county surveyor and put on record.

Mr. NOBLE, Counsel for Plaintiffs.—I move what Colonel Bouldin said be stricken out.

The COURT.—What Colonel Bouldin said about the force and validity of the map or the effect it might have and the authority of the county surveyor is stricken out.

To which ruling of the Court the defendants Wise then and there duly excepted.

WITNESS.—(Continued.) I have a copy of the map which I then made. Witness (producing paper) said: "This is the copy of the map that I made of that survey; this is a blue-print of the original."

Defendants Wise Exhibit 1.

Defendants Wise offered in evidence the said blueprint copy of the original map of survey made by the witness Roskruge, which showed Baca Float No. 3 marked according to the courses and distances of the 1866 location, and the same was received [211] in evidence by the Court, subject to plaintiffs' objection.

The original "Defendants Wise Exhibit 1" is not inserted here, but under order of the District Court the same has been ordered to be transmitted to the Circuit Court of Appeals as a part of the record in this case, and reference to this original map "Defendants Wise Exhibit 1" is hereby made. A photo-

graphic copy of said exhibit is as follows:

[CLERK'S NOTE: Photographic copy omitted from Transcript.] [212]

Defendants Wise Exhibit 2.

Defendants Wise offered in evidence duly authenticated copy from the records of the County Engineer of Pima County, Arizona, the successor in office of the County Surveyor, (the office of County Surveyor being recently abolished), of the map of Baca Float No. 3, as surveyed by Mr. Roskruge in 1887.

Plaintiffs objected on the ground that it was not a public record, that Mr. Roskruge did not make his survey as a public official.

The COURT.—The paper is admitted subject to plaintiffs' objections and with permission to plaintiffs to renew their objections later. The paper was then marked "Defendants Wise Exhibit 2" and is in words and form as follows, to wit: [213]



Tima County Arizona Hest 12 miles 36 ch we links tone + mon V.W COY Greaterville 3 South 12 miles 36 ch 2 44 links Gardiners = Baca Float N'3 Containing 99 289 39 Acres 378 / W So Hacienda del Sante Peta toneMone 1. W. Cor. East 12 miles 36 chs 4 a links

Magnetic Variation 12° 30 Fast

Survey commenced 26 the august 1887
" Completed 9th Sept = 1887
George J Roskruge

George J Roskruge County Surveyor



WITNESS.—Looking south from this courthouse a distance of about forty-five miles you see a peak something over 9,000 feet high in the Santa Rita mountains; I know the name of that peak; its name is Mt. Wrightson or Old Baldy; that mountain is platted upon the map that I made, being "Defendants Wise Exhibit 1," as Mt. Wrightson. I am acquainted with the Greaterville placers; they are on the eastern slope of the Santa Rita mountains; they are partially within the limits of this Baca Float No. 3 which I surveyed and they are shown upon that map (Defendants Wise Exhibit 1). Now, in regard to this location Baca Float No. 3 that I surveyed, it takes in both slopes of the Santa Rita mountains, it takes in very little but mountains or foothills.

I made a map of Pima County. I was employed making it in 1890–1891–2–3. I do not know of any other map of Pima County that has ever been made by any person other than the one made by me; there might have been one made by Mr. Simpson before I came in but I have never seen any copies of it. (Counsel then exhibited to the witness a map which purported to be a map of Pima County.) The map which you show me is a photograph of the map made by me in 1893—the map that I made for the supervisors of this county; this is the official map of the county, made so by the board of supervisors and so stated upon the map itself.

Question. Will you state whether or not there is

(Testimony of George J. Roskruge.)
marked upon that map the so-called Baca Float No.
3?

- A. That is Baca Float No. 3 (indicating) and the lines are marked on this map.
- Q. Does that take in these portions of the Santa Rita mountains?
 - A. Yes, sir; covering the Santa Rita mountains.
- Q. Is that the same Baca Float No. 3 that you surveyed in 1887? A. Yes, sir. [215]

Defendants Wise Exhibit 3.

Defendants Wise offered in evidence the map so shown and testified to by the witness which showed Baca Float No. 3 according to the courses and distances of the 1866 location; to which offer plaintiffs made the same objection that they had made to the testimony of the witness.

The Court received the said map in evidence subject to the objections of plaintiffs and the map was marked by the clerk "Defendants Wise Exhibit 3."

The original "Defendants Wise Exhibit 3" is not inserted here, but under order of the District Court the same has been ordered to be transmitted to the Circuit Court of Appeals as a part of the record in this case, and reference to this original map "Defendants Wise Exhibit 3" is hereby made.

WITNESS.—I will describe generally the kind of monuments that I erected on each of the four corners of Baca Float No. 3 that I surveyed in 1887, which were erected by me at that time: The Southwest corner was a large monument of stone and the Northwest corner was a large monument of stone,

and the Southeast corner and Northeast corner—they were posts put in surrounded by stone and dirt and along the whole line there were monuments placed as I said before, so that the lines could be easily traced.

Defendants Wise Exhibit 4.

Defendants Wise then offered in evidence certified copy of the petition of Sykes and Curry to the United States Surveyor General, filed December 15, 1879, asking for the survey and recommendation that they obtain patent title to the Calabasas and Tumacacari grant. And counsel stated that his object in making this offer, which would be followed by the offer of a map of the Tumacacari Grant, was to show to the court that the lands which are now known as Baca Float No. 3, or 1863 location, [216] were in those early days known as the Calabasas Grant, and the Tumacacari Grant.

Mr. HEATH.—We object to the admission of this evidence. These grants have been declared void—not to affect this grant. The fact that this grant which is a valid grant, was overlapped by certain void grants certainly has no tendency to prove that the land was not Baca Float No. 3.

The COURT.—I will admit it subject to this objection.

Said paper is as follows: [217]
To the Hon. John Wasson,

U. S. Surveyor General for Arizona,

The petition of John Curry and Charles P. Sykes, respectfully represents:

That they are the owners under various mesne conveyances, from the original grantees and denouncers of a certain tract of land or rancho, situated in the County of Pima, in the Territory of Arizona, known by the name of "Tumaccaccori and las Calabazas" a particular description of the location and boundaries of which tract of land or rancho, is clearly and explicitly given in the original expediente of the title, a duly authenticated copy of which is hereto annexed, marked exhibit "A," with a correct translation thereof, marked exhibit "B," and which are made a part of this petition.

Your petitioners further represent, that the original title papers set forth the following historic facts:

1st. That in the year 1908, Juan Legarra, Governor of the Indian Pueblo of Tumacaccori, situated in the jurisdiction of "Primaria Alta," petitioned Don Alejo Garcia Conde, Intendente of the Province and of the Royal Treasury, Political and Military Governor and Juez Privativo, to issue to the Indians of the Pueblo of Tumaccacori a grant for the "Fundo Legal" of the Pueblo and also for the "Estancia" (stock farm) of the Pueblo, the grant asked for to replace the ancient title papers, which had been given by the Spanish government to the Indians of said Pueblo, and which had been lost or destroyed.

That the petition was made to the Intendente in accordance with the Royal Instructions of the fifteenth (15th) day of October, 1754, and Article 81 of the Royal Ordinances and Instructions in rela-

tion to "Intendentes" of the Fourth (4th) day of December, 1786.

- 2d. That in accordance with said petition, the lands [218] petitioned for were ordered by the "Intendente" to be surveyed by the proper officer, and that on the fourteenth (14th) day of January, 1807, the said lands were surveyed and the boundary monuments established by Don Manuel de Leon, Commandante of the Presidio of Tubac.
- 3d. That on the second (2) day of April, 1807, the said Don Alejo Garcia Conde, Intendente &c, issued a Royal Patent on Title, under the laws referred to, to the Indians of the Pueblo of Tumaccacori for the lands, as, clearly and fully described in the proceedings in relation to the survey thereof; which proceedings are set out at length in the copy of the original expediente, marked exhibit "A," and which original title or patent, was duly registered in Book No. 174, existing in the "Juzgado Privativo."
- 4th. That under the laws of the Mexican Congress of the tenth (10th) of February, 1842, providing for the denouncement and sale of abandoned Pueblos, Don Francisco Aguilar, on the eighteenth (18th) day of April, 1844, became the owner, by purchase for the sum of (\$500.00) Five Hundred Dollars, of the four square leagues of agricultural and grazing lands, of the "fundo legal" and of the abandoned Pueblo of Tumaccacori, and the ——sitios of the estancia (stock farm) of Calabazas and the other places thereunto pertaining, the areas, boundaries, monuments and calindantes of which

are set forth in the corresponding proceedings of measurement made in the year 1807 by the Commissioner and Surveyor Don Manuel de Leon.

That the original proceedings of denouncement and sale to the said Aguilar are set forth at length in the original "Expediente" hereinbefore referred to, a copy of which is marked exhibit "B"; a registry of the sale and denouncement being made in the corresponding book. [219]

5th. That on the second (2d) day of March, 1869, Don Francisco A. Aguilar, by deed of conveyance, duly executed in the City of Guaymas de Zargoza, sold the lands purchased by him under denouncement as aforesaid to Don Manuel Ma. Gandara, which deed of conveyance, is fully set out in the original "Expediente" referred to and registered on folios 2 and 3 of the respective book.

6th. That on the twenty-fourth (24th) day of July, 1877, the said Don Manuel Ma. Gandara, of the State of Sonora, Republic of Mexico, sold and conveyed the premises hereinbefore described, to your petitioners John Curry and Charles P. Sykes, who are citizens of the State of California, as is shown by deed of conveyance executed to them by Don Manuel Ma. Gandara, bearing date July 24, 1877, which is hereto annexed, marked exhibit "C."

And your petitioners aver further that the ancient grant of the Rancho of Tumaccacori and las Calabazas, is referred to and called for in the records of coterminus grants, and also that it is referred to in the book of "Toma de Razon" of grants now existing in and forms a part of the ancient archives of the

Mexican State of Sonora, and of the ancient intendencia of the Spanish province of the same name. And further, that the bona fides of said title papers can be established, if required, by the testimony of expert witnesses, who are familiar with the laws, usages and customs of Mexico in relation to the granting of lands, and also acquainted with the handwriting of the Spanish and Mexican officials of that country during the time covered by these title papers.

Your petitioners further allege that the premises referred to were in actual and useful possession and occupation, by the original grantees for many years and so continued until when from inevitable causes they became deserted, and under the laws denounceable; whereupon the lands now claimed by your petitioners [220] were denounced and purchased by Don Francisco A. Aguilar, and that they have been owned and possessed by the said Aguilar and his successors from the date of said denouncement down to the present time; and that the possession thereof, during this time has been continuous, save when unavoidably interrupted by the hostility of the neighboring savages. And that your petitioners, under their purchase aforesaid, are not in possession and useful occupation of the said lands, having expended large sums of money in the development and improvement thereof.

In view of the foregoing, your petitioners claim that their title to the lands as described is absolute and indefeasible under the laws of Spain and Mexico; that it would be so held and regarded by the law of all civilized nations; and that it is guaranteed by the treaty stipulations between the Governments of the United States and Mexico, bearing date December 30, 1873.

They therefore claim a confirmation by the proper Tribunals of the Government of the United States of the title to all the lands as described in the original title papers, to which reference is made for a particular description of location and boundaries, asking that the whole of said original title papers be considered as a part of this their petition.

And they will ever pray, etc.

JOHN CURRY. C. P. SYKES.

San Francisco, Cal., December 15th, 1879. [221]

Defendants Wise Exhibit 5.

Defendants Wise offered in evidence a copy of a blue-print map made in 1880 of the Tumacacari and Calabasas Grants, duly certified to by the Surveyor General of Arizona, showing the Tumacacari and Calabasas Grants as shown in the Contzen survey.

Mr. Kingan objected to the introduction in evidence thereof on the ground that it is absolutely immaterial, and that they were proceeding upon the theory, as the Court said, that it should be admitted subject to plaintiffs' objections.

The Court permitted said instrument to be introduced in evidence subject to the objection of plaintiffs.

Paper marked by the clerk "Defendants Wise Exhibit 5."

The original "Defendants Wise Exhibit 5" is not

inserted here, but under order of the District Court the same has been ordered to be transmitted to the Circuit Court of Appeals as a part of the record in this case, and reference to this original map "Defendants Wise Exhibit 5" is hereby made.

Defendants Wise Exhibit 6.

Defendants Wise offered in evidence a map of Baca Float No. 3 as surveyed by Mr. Roskruge, that was filed in the office of the Surveyor General of the United States showing Baca Float No. 3 according to the courses and distances of the 1866 location.

The COURT.—It may be received subject to plaintiffs' objections.

Paper marked by the clerk "Defendants Wise Exhibit 6."

The original "Defendants Wise Exhibit 6" is not inserted here, but under order of the District Court the same has been ordered to be transmitted to the Circuit Court of Appeals as a part of the record in this case, and reference to this original map "Defendants Wise Exhibit 5" is hereby made. [222]

WITNESS.—I first heard of Baca Float No. 3 some time in the early 70's when I was in the Surveyor General's office; that was in 1870; from that time up to the year 1899 Baca Float No. 3 was always supposed to be in the Santa Rita Mountains. I never heard of it located anywhere but in that district.

Question. Now, speaking specifically with reference to the land that you surveyed, where was Baca Float No. 3 with reference to the land that you surveyed for Mr. Bouldin up to 1899. Do you understand my question?

A. I understand. Well, it is about where I surveyed, always supposed to be there.

In 1887 or prior to that time I knew a Mexican grant called the Calabasas Grant and also the Tumacacari Grant. I knew where they were situated. I made a map of those grants. My attention is called to the blue-print map which is marked "Defendants Wise Exhibit 5," purporting to be a map of Calabasas and Tumacacari Grants; I made the original of that map.

The COURT.—All this is admitted, all of this witness' [223] testimony is admitted subject to the objection of plaintiffs.

WITNESS.—(Continuing.) That map referred to was made in 1880; The Surveyor General's signature is on that map. At that time I knew about where the Calabasas Grant was and where the Tumacacari Grant was; the lands which were included within this survey were not at any time prior to the year 1899 known by the name of "Baca Float No. 3." The names of those lands included within the limits shown on this map (Defendants Wise Exhibit 5) as Calabasas and Tumacacari Grants were known as Calabasas and Tumacacari Land Grants, and they were in the valley of the Santa Cruz.

No cross-examination.

Thereupon Mr. Noble, counsel for plaintiffs, moved the Court to strike out all the testimony of the witness George J. Roskruge taken subject to the objection of plaintiffs on the grounds stated in the various objections, and the Court then stated that the ruling on this motion would be reserved until the close of defendants testimony.

Testimony of John E. Magee.

JOHN E. MAGEE was called as a witness on behalf of the defendants Wise and having been first duly sworn, was examined and testified as follows:

WITNESS.—My name is John E. Magee; age 75; at the present time I am Secretary of the Arizona Pioneers' Historical Society. I live in Tucson, Pima County, Arizona, and have lived here for forty years and six months. I first came to Pima County in December, 1874. I am acquainted with the so-called Baca Float No. 3, which took in Mt. Wrightson and which commenced from the Hacienda de Santa Rita, commonly known as the 1866 [224] location. I was on it for about fifteen years and off and on since. I landed on what is called the Salero Mine, December 31, 1874, at nine o'clock at night; the Salero Mine is within the bounds of that amended location of Baca Float. I came to this country under the employ of the Sonora Mining & Exploration Company which purported to hold the title to the amended location of Baca Float No. 3. I came here to take charge of and look after that title and have it surveyed. After I had looked around I went to the Surveyor General's who was then John Wasson, described to him the land, the amended location as I understood it by my diagrams I brought with me and asked for a survey of that land. He point blank refused to survey it on the ground that it was known to be mineral for one hundred years, showed mineral on its surface from one end to the other, and took down a book, I think, of the laws of the United States of 1856 or '60.

(Testimony of John E. Magee.)

Mr. NOBLE.—We object to all this line of testimony on the ground that it is immaterial, incompetent and irrelevant.

The COURT.—I think we will save time by admitting it subject to the plaintiff's objection.

Mr. FRANKLIN.—Mr. Magee, please state what you did in regard to finding out or ascertaining where the '66 location was upon the ground.

WITNESS.—I had in my possession a diagram made by Rafael Pompelly who was a metallurgist at the Hacienda de Santa Rita when this Baca Float or amended location, was made, showing the relative position of the original location and the relative position of the amended location. I did not know where the monuments were myself. I had to find them as best I could. Mr. John T. Smith, who helped to carry the chain in surveying, Alphonse Rickman of Tubac, who was present at different [225] times and saw some of the monuments, told me where the monuments were; the monuments of the original location, and the commencement of the amended location and one or two monuments on that. Speaking generally, I knew what country was included in the amended location; it covered the Santa Rita Mountains from a short ways south of the Salero Mine up to the Santa Rita peak and maybe beyond; I couldn't say positively. The Santa Rita peak is generally known by the name of Mt. Wrightson, Old Baldy, and also Santa Rita peak; that peak was within the limits of the '66 location as I then discovered.

(Testimony of John E. Magee.)

The Hacienda de Santa Rita was at that time a well-known point; it was established by the Wrightsons and Raphael I. Pompelly. It was a new building put up for housing the officers and some of the men who were working there on the mines, and they called it, as they do all Spanish residences, Hacienda, and gave it the name of Santa Rita, I presume, I don't know, from the mountains. I have known the Hacienda de Santa Rita forty years and some months. Some of the buildings are there; the ruins are there.

I was acquainted with a gentleman by the name of Christopher E. Hawley. I met him there in Tucson in March, 1875, if I am right, I think so. I went out with Mr. Hawley to the Hacienda de Santa Rita. He did not make any statement to me in regard to the Baca Float, or, at least, Baca Float No. 3, '66 location at that time. He told me that he was interested, or would be interested in Baca Float No. 3 and would like to see the country. I showed him where Baca Float No. 3 was at that time; I showed him what I took and learned to be the amended location of Baca Float No. 3, covering the Santa Rita Mountains, as described a little while ago.

Mr. FRANKLIN.—At this point your Honor, I would like [226] to show the Court a photograph of the Hacienda de Santa Rita contained in a book written by J. Ross Brown. The Court takes judicial notice of History. I will state, your Honor, that my only object in introducing whatever may be pertinent in that book, or calling attention to it, is to show that the Hacienda de Santa Rita was a well-

known and established point. That refers to it before it was destroyed. The history shows it was destroyed by the Indians I think in '63, partially destroyed and it has been rebuilt and occupied ever since.

The COURT.—It may be admitted for the purpose for which it is offered.

Defendants Wise Exhibit 7.

Defendants Wise then offered in evidence a duly certified copy of the record in Pima County of a power of attorney from Christopher E. Hawley to John E. Magee, acknowledged before Charles Myer, Justice of the Peace in Pima County, executed in May, 1875, for the purpose of showing that Mr. Hawley was here in Tucson at that time.

The COURT.—It shows that he was here at that time. Is that simply for the purpose of corroborating witness's statement?

Mr. FRANKLIN.—Yes, your Honor, that he was here at that time.

Plaintiffs objected to the introduction in evidence of said instrument on the ground that it is not germane to any of the issues of this case, and does not seem to have any reference whatever to Baca Float No. 3.

The Court ordered that said instrument be received in evidence subject to plaintiffs' objection.

Paper marked "Defendants Wise Exhibit 7," and is as follows: [227]

KNOW ALL MEN BY THESE PRESENTS: That I, CHRISTOPHER E. HAWLEY, now resi-

dent of Tucson, Arizona Territory, by virtue of the power and authority to me given in and by the power of attorney of Cyrus Strong, Tracy R. Morgan, Job W. Congdon and John Evans all of the city of Binghampton, Broome County, State of New York, bearing date of the 15th day of March, A. D. 1875, and recorded in the office of the County Recorder of the County of Pima, Arizona Territory, on the 4th day of May, A. D. 1875, in Book one of Miscl. Records, pages 317 and 318, authorizing me to locate, perfect and dispose of mining claims in Arizona, to sell, dispose and generally manage the same and empowering me generally to do business for them in Arizona and Sonora, with full power of substitution and revocation, do substitute and appoint John E. Magee of Tucson, said Territory, as special attorney in fact and for the sole purpose to abandon old mining claims and locations of mines hitherto made in the Santa Rita Mountains, about seventy miles south of Tucson, in the name of my said principals for the purpose of relocating the same correctly and in conformity with the United States laws and the mining law of the Truman District in said Pima County and Territory for the benefit of and in the name of my said principals, to do, perform and execute every act in the premises of abandoning said claims, relocating, correcting locations, recording said claims in said Santa Rita Mountains, the same as I might or could do under and by virtue of said power of attorney as well for me as being the true and lawful attorney and substitute of the said parties of said Binghampton, for the special purposes specified, hereby ratifying and

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confirming all that the said attorney and substitute hereby made and appointed shall do in the premises by virtue hereof and of the said power of attorney and as specially limited herein. [228]

IN WITNESS WHEREOF I have hereunto set my hand and seal the fourth day of May, 1875.

CHRISTOPHER E. HAWLEY. [Seal]
Signed, sealed and delivered in the presence of
CHARLES H. MEYERS.

Territory of Arizona. County of Pima,—ss.

On this 4th day of May, A. D., 1875, before me, the undersigned, a Justice of the Peace in and for the above county and territory, duly sworn and commissioned, personally came Christopher E. Hawley to me well known as the person who executed the foregoing instrument as a party thereto and acknowledged that he executed the same freely, voluntarily and for the purposes therein set forth.

Witness my official signature the day and year first above written, at Tucson, Arizona Territory.

CHARLES H. MEYERS,

Justice of the Peace, Pima County.

Filed and recorded at request of C. E. Hawley, at 3 o'clock P. M., May 4th, A. D. 1875.

S. W. CARPENTER,

Recorder. [229]

WITNESS.—I had a diagram showing where the monuments of the original location were, but they were not specific, and I called upon these gentlemen because one of them purported to have carried the chain by which it was surveyed primarily and the

(Testimony of John E. Magee.)

other man, Mr. Alphonse Rickman said he knew of it. They showed me some of the monuments. The amended location did not include the Calabasas and Tumacacari Grants. I couldn't answer in regard to the original location because I paid no attention to it. I came here to take charge of the amended location and of course had nothing to do with the other, not officially.

Cross-examination.

(By Mr. KINGAN.)

WITNESS.—I do most surely know from a map made by the Government of the United States on file in L. H. Manning's, the Surveyor General's, office, at the time I was to have a hearing over there, that the amended location of '66 was practically turned over from the south—from the original location of '63, practically turned over to the north; so I knew where the '63 location was.

Mr. NOBLE.—Your Honor, we make pro forma the same motion.

The COURT.—You may renew your motion at the end of the defendants' case, or at the end of the trial.

Defendants Wise Exhibit 8.

Defendants Wise introduced in evidence without objection a duly exemplified copy of a deed dated and acknowledged December 1, 1892, and recorded December 20, 1892, from John C. Robinson to John W. Cameron, said deed being as follows: [230]

THIS INDENTURE, made this first day of December, A. D., 1892, between John C. Robinson, of Binghampton, New York, party of the first part, and

John W. Cameron, of Washington, D. C., party of the second part, WITNESSETH:

That the said party of the first part, for and in consideration of one dollar in hand paid to the said party of the first part by the said party of the second part, receipt of which is hereby acknowledged, and in consideration of certain uses and purposes set forth in a declaration of trust made by the said party of the first part, and dated November 28, 1892, doth hereby grant, convey and confirm to the said party of the second part, his heirs, and assigns forever, all his right, title and interest in and to that certain tract of land, situate, lying and being in the County of Pima, Arizona Territory, the same being the southern half of the tract of land known as Baca Float No. 3; containing 100,000 acres more or less, the said southern half of said tract of land having been conveyed to the said party of the first part by deed of partition from Powhattan W. Bouldin and James E. Bouldin. by their attorney in fact D. W. Bouldin, all of Austin, Texas, executed at Austin, Texas, and dated the twelfth day of November, A. D. 1892, bounded and described as follows, viz.: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, eighteen chains and twenty-two links, running thence east twelve miles, thirty-six chains and forty-four links; running thence south six miles, 18 chains and 22 links; running thence west twelve miles, 36 chains and 44 links to the place of beginning, together with all and singular

the tenements and appurtenances thereunto belonging and also all the estate, right, title and interest, property, possession, claim and [231] demand whatsoever, as well in law as in equity of the party of the first part, in and to the above-described premises and every part and parcel thereof. To Have and to Hold said claims and rights and all and singular the above mentioned and described premises unto the said party of the second part, his heirs and assigns forever.

In Witness Whereof the said party has hereunto set his hand and seal on the day and year first above written.

JNO. C. ROBINSON. [Seal]

State of New York, County of Broome,—ss.

On this 1st day of December, 1892, before me personally came John C. Robinson, who signed the above instrument and who acknowledged the execution of the same.

[Seal]

D. L. BROWNSON,
Notary Public.

Filed and recorded request of Wells Fargo & Co. December 20th, A. D. 1892, at 10 o'clock A. M.

CHAS. A. SHIBELL, County Recorder. [232]

Defendants Wise offered in evidence certain deeds and certain copies of records of deeds from alleged descendants of Antonio Baca, the alleged son of Luis Maria Baca, executed to Marcos C. de Baca, as hereinafter set forth. Plaintiffs, defendants Bouldin and defendant Santa Cruz Development Company, objected to the introduction of each and all of said deeds, on the ground that the defendants Wise claim under the deeds of May 1, 1864, Plaintiffs' Exhibit "C," and of May 30, 1871, Plaintiffs' Exhibit "O," and they are bound by the recitals contained in these deeds as to who the heirs of Luis Maria Baca are.

The objection was overruled by the Court and exceptions allowed to the plaintiffs, defendants Bouldin and Santa Cruz Development Company.

The deeds so offered in evidence and so introduced in evidence over the objections and exceptions as aforesaid, are as follows:

Defendants Wise Exhibit 9.

Deed from Juana L. Baca widow of Jose Baca, Preciliana Baca, Esteban Baca, Francisco Baca, Luciana Baca, Pilar Baca, and Inez Lucero, daughter of Epigmenia Baca, deceased, to Marcos C. de Baca, dated and acknowledged August [233] 20, 1913, and recorded August 29, 1913, which without the statement of parties and consideration, the habendum, signatures and certificates of acknowledgment and record, reads as follows, after describing and conveying the 1863 location by correct metes and bounds:

"Being the same premises that descended to the parties of the first part as the widow and children of Jose Baca, who was the son of Juan Manuel Baca who was the son of Antonio Baca, who was the son of Luis Maria Baca and one of the heirs to whom said grant was made by the Act of Congress of the United States of America on the 21st day of June, 1860."

Defendants Wise Exhibit 10.

Deed from Guadalupe Mares de Sandoval, Meliton Mares, Eulogio Mares, Eutimio Mares, Higinio Mares and Pablo Mares, children and heirs of Preciliana Baca de Mares and her husband Antonio Mares, both deceased, to Marcos C. de Baca, dated and acknowledged August 27, 1913, and recorded September 15, 1913, which without the statement of parties and of consideration, habendum, signatures, certificates of acknowledgments and of record, reads as follows, after describing Baca Float No. 3 by the metes and bounds of the 1863 location:

"Being the same premises that descended to the parties of the first part hereto as children of Preciliana Baca, who was the daughter of Juan Manuel Baca, who was the son of Antonio Baca, who was the son of Luis Maria Baca, and one of the heirs to whom said grant was made on the 21st day of June, 1860, by an Act of Congress of the United States."

Defendants Wise Exhibit 11.

Deed from Martin M. Baca, widow of Ignacio Baca, Guillerma Baca and Eloisa Baca, children of Ignacio Baca, deceased, to Marcos C. de Baca, dated and acknowledged the 21st day of August 1913, and recorded August 29, 1913, which without the statement of parties and consideration, habendum, signatures and certificates of acknowledgment and record, [234] reads as follows, after describing Baca

Float No. 3 by the metes and bounds of the 1863 location:

"Being the same premises that descended to the parties of the first part as widow and children of Ignacio Baca, who was a son of Jose Baca, who was a son of Juan Manuel Baca, who was a son of Antonio Baca who was the son of Luis Maria Baca and one of the heirs to whom said grant was made by the Act of Congress of the United States of America on the 21st day of June 1860."

Defendants Wise Exhibit 12.

Deeds from Vidal N. de Mares, widow of Ines Mares, Vitalia Mares, Santiago Mares, Victor Mares, Adela Mares, Fermina Mares, Ramon Mares and Andres Mares, children of said Vidal N. Mares and Ines Mares, deceased, to Marcos C. de Baca, dated August 30, 1913, acknowledged September 2, 1913, and recorded September 15, 1913, which, without the statement of parties and consideration, habendum, signatures and certificates of acknowledgment and record, reads as follows, after describing Baca Float No. 3 by the metes and bounds of the 1863 location:

"Being the same premises that descended to the parties of the first part hereto as the widow of Inez Mares, deceased, and his children being a son and grandchildren of Preciliana Baca, who was the daughter of Juan Manuel Baca, who was a son of Antonio Baca, who was a son of Luis Maria Baca, and one of the heirs to whom said grant was made on the 21st day of

June, 1860, by an Act of Congress of the United States."

Defendants Wise Exhibit 13.

Deed Marcos C. de Baca and Francisco C. de Baca his wife, to Joseph E. Wise and Jesse H. Wise, dated and acknowledged the 17th day of September 1913, and recorded October 14, 1913, which, without the statement of parties and consideration, habendum, signatures and certificates of acknowledgment and record, reads as follows after describing Baca Float No. 3 by the metes and bounds of the 1863 location: [235]

"Being the same premises purchased by the said parties of the first part from the heirs and children of Jose Baca and Preciliana Baca, who were the children of Juan Manuel Baca, who was a son of Antonio Baca who was a son of Luis Maria Cabeza de Baca, and one of the heirs to whom said grant was made on the 21st day of June, 1860, by an Act of Congress of the United States, as said interest appears by quitclaim deeds duly executed by said heirs

to the said party of the first part, reference to which is hereby made."

Defendants Wise Exhibit 14.

Defendant Joseph E. Wise then offered in evidence a paper in the words and figures following, the nature of the case requiring that it be printed in full:

"THIS INDENTURE, made the fourteenth day of January A. D. One thousand eight hundred and seventy-eight, between the parties whose names are

subscribed to this instrument of writing as parties of the first part, of the State of California, and D. W. Bouldin, of the State of Missouri, party of the second part, WITNESSETH: That the parties of the first part for and in consideration of the sum of One dollar to each and every one of them in hand paid by the said Bouldin party of the second part, and before the ensealing and delivery of these presents, the receipt whereof is hereby, by each and every one of them respectively acknowledged, and the further consideration, as hereinafter expressed, granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said D. W. Bouldin, party of the second part, and to his heirs and assigns forever, all the undivided twothirds of all our right, title and interest of, in and to the follwing described tract or parcel of land, to wit: Being situated lying and being about twenty-five (25) leagues from the City of Santa Fe in the State or Territory of New Mexico (whichever it may be at this time) and was called or was known and may be now known as the Rancho 'Las Vegas' and granted to Luis Maria Baca for a more perfect description of which reference is hereby made, especially to the description made in said Grant, the petition or papers in connection therewith. Together with the undivided two thirds of any lands that may have been or may be granted by the United States Government to Luis Maria Baca, or his heirs, in lieu of the 'Las Vegas,' Grant or otherwise, it being understood by us, at this time, that the Congress of the United States by special Acts have granted other

lands in lieu of the said 'Las Vegas' grant, divided into five (5) different parts or parcels, and described as follows, the same being in accordance with the description as taken from the Surveyor General's office at Santa Fe, New Mexico, to wit: Location No. 1. The 1/4 Section, Corner, two miles and a half west of township corner to township 19 and 20 N. of base line, Ranges 4 and 5 east of New Mexico prin-[236] meridian, as a center point to the tract of said Baca the boundaries of which lying on the four cardinal points: the tract containing 99,289-39/100 acres. This selection being thus made in conformity to law and instructions. Location No. 2, made under the 6th section of an act of Congress approved June 21st, 1860, situate on the Canadian or Red River in the Territory of New Mexico, and described as follows, to wit: beginning at the corner of sections 21, 22, 27 and 28, in Township 13 North of the base line, and range 29 east of New Mexico, principal meridian, running from said initial point six miles, eighteen chains and twenty-two links, thence east twelve miles thirty-six chains and forty-four links; thence west twelve miles, thirty-six chains and forty-four links; thence north six miles, eighteen chains and twenty-two links to the place of beginning, containing ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine hundredths of an acre more or less.

Also Location No. 3 situate in the Territory of Arizona formerly Dona Ana County, New Mexico, and described as follows, to wit: Commencing at a point one mile and a half from the Salero Mountain,

in a direction North forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links; thence east twelve miles, thirty-six chains and forty-four links; thence north twelve miles, thirty-six chains and forty-four links to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less. Also Location No. 4, situate in Costilla County, Colorado Territory, (now the State of Colorado, formerly in Taos County, New Mexico, known and described as follows, to wit: Beginning at a point on the eastern edge of the San Luis Valley, where the thirty-eight degree of latitude crosses the dividing line of the plain and mountain, thence east along said parallel of latitude four and one-half miles, thence south at a right angle to said parallel of latitude twelve and one-half miles, thence west at a right angle, twelve and one-half miles, thence north at a right angle, twelve and one-half miles to the aforesaid parallel of latitude, thence east with said parallel of latitude eight miles, to the place of beginning; containing ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less.

Also Location No. 5, made under act of Congress of June 11th, 1864. The following tracts of land situate about fifty miles East of the Colorado River, on the trail from Fort Mohave to Prescott, beginning at the head of Francis Creek, at a certain monu-

ment erected by John Moss on his trail from Fort Mohave to Prescott, in the year 1364, near the large black or burnt mountain, said Francis Creek being one of the tributaries of Bill Williams Fork. Commencing at said monument for the center of the West line, running from said center North six miles and eighteen 22/100 chains, thence East twelve miles and 36 44/100 chains; thence south twelve miles and 36 44/100 chains, thence West twelve miles, and 36 44/100 chains, thence North six miles, and 18 22/100 chains to the place of beginning at said monument. Together with the undivided two thirds of all and singular the tenements, [237] hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits to the undivided two-thirds parts thereof. To Have and to Hold All and singular the undivided twothird parts thereof of the above mentioned and described premises.

Together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever. And the said D. W. Bouldin, party of the second part agrees hereby and hereto in further consideration of the conveyance, that he will use the greatest diligence that may be in his power, without interfering with his other business affairs, to prosecute to a final settlement and adjudication of the title to said Rancho Las Vegas, or the title to any lands granted or allowed, by the United States to be taken in lieu of said Rancho Las Vegas as hereinbefore described, at his own individual expense

without further costs or charges to either or the whole of us whose names are subscribed hereto as parties of the first part, the said Bouldin hereby agreeing that he will pay all expenses to lawyers, courts fees and whatever else may be necessary to the final adjudication or settlement of said title without any cost whatsoever to us or either of us. And the parties of the first part whose names are subscribed hereto do hereby nominate, constitute and appoint the said D. W. Bouldin our true and lawful agent and attorney, irrevocably, to take possession of the whole of said Rancho Las Vegas or any part or parcel, or any lands granted by the U.S. Government in lieu thereof, as hereinbefore described, to receive and receipt for the rents that may be due, for the use and occupation of said lands by any person or persons, using or having used, occupying or having occupied the said Ranch Las Vegas or any part or parcel thereof, and to sell, mortgage or lease the said Rancho Las Vegas, or any part and parcel thereof, for such sum or sums, price or prices, and upon such term or terms as he may deem proper and fit to do; and to execute and deliver all necessary deeds of conveyance, mortgages or leases to receive the purchase money, interests or rents for the same, as fully and to all intents and purposes, as we or either of us might or could do if personally present. Hereby ratifying and confirming all and singular the acts and deeds of our said agent and attorney D. W. Bouldin, lawfully done or to be done, in and about the premises, as fully and to all intents and purposes as we or either or all of us might or could do were we personally present.

In Witness Whereof, we the said parties of the first and second parts have hereunto set our hands and seals. The words "or any lands granted by the U. S. Government in lieu" were interlined over the twenty-third line on the sixth page before signing and execution.

D. W. BOULDIN, (Seal)
Party of the 2d Part.

Parties of the first part as follows:

His

RAFAEL X PRADA (Seal)
Mark

His

DOLORES X BACA DE PARADO. (Seal)
Mark [238]

Witness to the above signatures:

JESUS M. BACA.

MIGUEL BACA.

NEPOMUCENO BACA.

APOLONIA BACA DE ADAMSON.

JACINTO BERREYESA.

FELIPA DE BACA BERREYESA.

PATRICIO BACA.

FRANCISCO BACA.

Acknowledged in various California counties and recorded in Pima County, March 25, 1885.

Defendants Wise Exhibit 15.

Defendants Wise offered in evidence a deed or instrument from Maria Estefana Gorduna and others to David W. Bouldin, duly acknowledged and recorded on the 25th day of March, 1885, in Pima

County, Arizona, in the words and figures following, unnecessary parts thereof being omitted, to wit:

"THIS INDENTURE, made the fourteenth day of January, A. D. 1875, between the parties whose names are subscribed to this instrument of writing as parties of the first part of the State of California, and D. W. Bouldin, party of the second part, of the State of Missouri, Witnesseth: That the said parties of the first part, for and in consideration of the sum of one Dollar to them in hand paid by the said Bouldin, party of the second part, and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged; and the further consideration as hereinafter expressed have remised, released and quitclaimed and do by these presents remise, release and quitclaim unto the said D. W. Bouldin, party of the second part, and to his heirs and assigns forever, the undivided two thirds of all our right, title and interest in and to the following described tract or parcel of land, to wit: Being situated, lying and being about twenty-five (25) leagues from the City of Santa Fe in the State or Territory of [239] New Mexico (whichever it may be at this date) and was called, or was known and may be now known as the Ranch "Las Vegas," and granted to Luis Maria Baca, a more perfect description of which reference is hereby made especially to the description made in said Grant, the petition or papers in connection therewith, together with the undivided two thirds of any lands that may have been, or may be granted by the United States Government, to Luis Maria Baca, or his heirs, in lieu of the "Las Vegas" Grant, or otherwise, it being understood by us, at this time, that the Congress of the United States by special Acts have granted other lands in lieu of the said "Las Vegas" grant, divided into five (5) different parts or parcels and described as follows, the same being in accordance with the description as taken from the Surveyor General's Office at Santa Fe New Mexico, to wit. . . .

Also Location No. 3, situate in the Territory of Arizona, formerly in Dona Ana County, New Mexico, and described as follows, to wit: Commencing at a point one mile and a half from the Salero mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point West twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-four links; thence east twelve miles, thirty-six chains and forty-four links; thence north twelve miles, thirty-six chains and forty-four links, to the place of beginning, containing ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine hundredths of an acre more or less. . . .

Together with the undivided two thirds of all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits to the undivided two thirds parts thereof. [240]

To have and to hold all and singular the undivided two thirds parts thereof of the above mentioned and described premises together with the appurte-

nances, unto the said party of the second part, and to his heirs and assigns forever; and the said D. W. Bouldin, party of the second part agrees hereby and hereto, in further consideration of the conveyance hereinbefore expressed, that he will use the greatest diligence that may be in his power, without interfering with his other business affairs to prosecute to a final settlement and adjudication of the title to said Rancho "Las Vegas" or the title to any lands granted or allowed by the United States, to be taken in lieu of said Rancho "Las Vegas," as hereinbefore described, at his own individual expense, without further costs or charges to either, or the whole of us, whose names are subscribed hereto as parties of the first part, the said Bouldin herby agreeing that he will pay all expenses to lawyers, courts fees and whatever else may be necessary to the final adjudication or settlement of said title, without any cost whatsoever to us or either of us. And the parties of the first part whose names are subscribed hereto do hereby nominate, constitute and appoint the said D. W. Bouldin, our true and lawful agent and attorney irrevocably to take possession of the said lands hereinbefore described, to receive and receipt for the rents that may be due for the use and occupation of said land, by any person or persons using or having used, occupying or having occupied the said land, and to sell or lease the said land; to execute all necessary deeds of conveyance, or of lease, to receive the purchase money, or rents for the same, as fully and to all intents and purposes, as we or either of us, might or could do if personally present, hereby ratifying and confirming all and singular the acts and deeds of our said [241] agent and attorney D. W. Bouldin, lawfully done or to be done in and about the premises, as fully as and to all intents and purposes, as we, or either of us could do, were we personally present.

In Witness Whereof, we the parties of the first part and second part have hereunto set our hands and seals.

D. W. BOULDIN, (Seal)
Party and part.

Parties of the first part as follows:

MARIA ESTEFANA GORDUNA,

Late wife of Manuel Baca, deceased, the son of Miguel Baca, deceased who was the son of Luis Maria Baca, deceased.

Her X (Seal)

Witness:

H. B. BLAKE.

Her

JESUS MARIA X BACA, (Seal)

Mark

Son of Jose Antonio Baca, deceased, the son of Luis Maria Baca, deceased.

Her

INES X BACA, (Seal)

Mark

Daughter of Jesus Maria Baca, son of Luis Maria Baca, deseased.

His

NEPONUCENO X BACA (Seal)

Mark

Son of Juan Manuel Baca, deceased.

MANUEL BACA, (Seal)

Son of Maria de Jesus Baca, daughter of Juan Manuel Baca, deceased.

JUAN BACA, (Seal)

Son of Maria de Jesus Baca, deceased, daughter of Juan Manuel Baca, deceased."

To the introduction in evidence of said instrument Mr. Kingan, of counsel for plaintiffs, said:

"If the Court please, the burden is upon these people who did not get the legal title and could not have gotten the legal title, because it passed in 1870, the burden is upon them before the instrument is admissable to show that they were innocent purchasers for value. The title having passed in [242] 1870 there wasn't anything left to convey, and the only way they could get anything was by recordation and being innocent purchasers for value, which they must prove, and which hasn't even been alleged in this case.

The COURT.—Well, I will let it in subject to the objection.

Defendants Wise Exhibit 16.

Defendants Wise then offered in evidence a deed or instrument in words and figures following, the nature of the case requiring that it be printed in full:

"THIS INDENTURE, made the thirtieth day of September, A. D., one thousand eight hundred and eighty-four, between John Watts of the County of Santa Fe, in the Territory of New Mexico, in his own proper person and J. Howe Watts, of the County of Grant, Territory of Arizona, and Elizabeth A. Watts, Mary A. Wardwell, Atwater Wardwell and his wife Louise Wardwell and Albert L. Bancroft and his wife Francis A. Bancroft, of the City of San Francisco, in the State of California, all of whom are heirs at law of John S. Watts deceased, parties of the first part, and David W. Bouldin, of the County of Pettis in the State of Missouri, party of the second part, Witnesseth, that the parties of the first part, for and in consideration of the sum of One dollar to each and every one of them in hand paid by the party of the second part, the receipt whereof is hereby, by each and every one of them respectively acknowledged, and for the further consideration, covenants and agreements to be performed by the party of the second part, as hereinafter mentioned and for the purpose of compromising and settling the claims of title between the parties of the first and second part, and of perfecting and quieting the title to the lands hereinafter described, have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the said party of the second part and to his heirs and assigns forever, all the undivided two-thirds (2/3) of all our right, title and interest of, in and to the following described tracts or parcels of land, to wit: Location No. 2, which was duly located in the office of the Surveyor-General of the Territory of New Mexico, under and by virtue and in accordance with the provisions of the 6th Section of an Act of Congress passed June 21st, 1860, entitled "An Act to confirm certain private land claims in New Mexico," and found in Volume 12, page 71 [243] of the United States Statutes at large, said location having heretofore been duly surveyed and returned to the Surveyor-General's office of New Mexico, and duly approved by said Surveyor-General and is described as follows: Situated on the Canadian or Red River in the Territory of New Mexico, beginning at the corner to Sections 21, 22, 27 and 28 in Township 13 North of the base line, and range 29 east of New Mexico principal meridian running from said initial point six miles eighteen chains and twenty-two links, thence east twelve miles, thirty-six chains and fortyfour links, thence south twelve miles, thirty-six chains and forty-four links, thence west twelve miles, thirty-six chains and forty-four links, thence north twelve miles, thirty-six chains and forty-four links to the place of beginning containing ninetynine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less. Also Location No. 3, which was located under and by virtue of the aforesaid 6th section of an Act of Congress passed June 21, 1860. Said location was heretofore duly surveyed in accordance with the provisions of said Act and the field notes returned to the proper office but the Surveyor-General disapproved the same, as being located on mineral lands. Said location is described as follows: Situated in the Territory of Arizona, formerly in Dona Ana County, New Mexico. Beginning at a point one mile and a half from the Salero Mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence east twelve miles, thirty-six chains and forty-four links, thence north twelve miles, thirty-six chains and forty-four links to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre more or less.

Also Location No. 4, which was also duly located and surveyed under and by virtue of the aforesaid 6th section of an act of Congress, passed June 21st, 1860, and the survey duly returned and approved by the Surveyor-General of New Mexico, and is described as follows: Situated in Costillo County, Colorado Territory (now the state of Colorado) formerly in Taos County, New Mexico. Beginning at a point on the Eastern edge of the San Luis Valley where the thirty-eight degree of latitude crosses the dividing line of the plain and mountain, thence east along said parallel of latitude four and one-half miles, thence south at a right angle, twelve and onehalf miles, thence north at a right angle twelve and one-half miles to the aforesaid parallel of latitude, East with said parallel of latitude, eight miles to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre more or less. Also the grant or concession of land made by the Government of Spain to Louis Maria Baca known as the "Rancho Las Vegas," situated about

25 leagues from the City of Santa Fe, and upon which the City of Las Vegas in the Territory of New Mexico is now situated, for a more particular description of which reference is made to said Grant, and the petition and papers connected therewith. [244]

To Have and to Hold, all and singular the undivided two-thirds parts of the above-described land, together with the undivided two-thirds of all and singular the rights, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, profits and issues to the undivided two-thirds parts thereof. It being understood and agreed that this is a quitclaim title and that the parties of the first part are not to be responsible to the party of the second part for the failure of title or any part thereof. And it being further understood, covenanted and agreed, that if in the settlement of the title to the above-described premises with other claimants to said lands the parties of the first part should become entitled to moneys or other property in lieu of said lands or any part thereof by reason of any sale or other transaction made by their ancestor John S. Watts deceased, then and in that event the two-thirds part of said money or other property is hereby conveyed and assigned to the party of the second part. And also if in perfecting the title to Location No. 3, above-described other land or lands Certificates should be granted by the U.S. Government in lieu thereof then and in that event the parties of the first part hereby bargain,

sell, grant and convey to the party of the second part, an undivided two-thirds of such other lands or land certificates as may be received by them in lieu of said lands as aforesaid. And the said David W. Bouldin party of the second part, hereby covenants and agrees with the parties of the first part in further consideration of this conveyance, that he will use the greatest diligence that may be in his power without interfering with his other business affairs to prosecute to a final settlement and adjudication all conflicting claims and titles to the above-described lands or all claims arising out of and due from any sale of said lands heretofore made by the said John S. Watts deceased, and also to the perfecting of the title to location No. 3, above-described from the Government of the United States or acquiring other lands or land certificates in lieu thereof if the same can be recovered or procured from the Government of the United States at his own individual expense and without futher cost or charges to the parties of the first part, or any of them; the said D. W. Bouldin hereby agreeing that he will pay all expenses to lawvers, all court fees and all other expenses incurred or to be incurred in and about the business, and will do whatever else may be necessary to the final adjudication or settlement of said title without any cost whatever to the parties of the first part. And upon the final and complete setlement of the titles to said lands, and all matters connected therewith, the parties of the first part are to have, own and possess in fee an undivided one third of the net lands recovered and one undivided one-third of the land certificates

obtained, and an undivided one-third of all moneys and other property recovered and secured by the party of the second part, net. And the parties of the first part do hereby nominate constitute and appoint the said David W. Bouldin our true and lawful agent and attorney in fact, to take possession of the [245] whole of the above-described lands or any part or parcel thereof, or any lands or land certificates granted in lieu thereof, or any money or other property in lieu thereof, to receive and receipt for the rents that may be due for the use and occupation of said lands and to compromise, sell, mortgage or lease said above-described lands, or any part thereof, for such sums, price and prices as he may deem for the best interest of the parties hereto, and to execute and deliver all necessary deeds of conveyance, mortgages or leases, to receive the purchase money thereof, and fully to do and perform all and everything whatsoever requisite and necessary to be done in and about the premises as fully as we ourselves could do if personally present, with full power of substitution and revocation hereby ratifying and confirming all that our said attorney or his substitutes shall lawfully do or cause to be done in the premises by virtue hereof.

In Witness Whereof the parties of the first part and second part have hereunto set their hands and seals the day and date above written.

JOHN WATTS. (Seal)
ELIZABETH A. WATTS, (Seal)
By Attorney in Fact,

JOHN WATTS. (Seal)

FANNY A. BANCROFT, (Seal)

By Attorney in Fact,

JOHN WATTS. (Seal)

MARY A. WARDWELL, (Seal)

By Attorney in Fact,

JOHN WATTS. (Seal)

LOUISE WARDWELL, (Seal)

By Attorney in Fact,

JOHN WATTS. (Seal)

J. HOWE WATTS, (Seal)

By Attorney in Fact,

JOHN WATTS, (Seal)

A. L. BANCROFT, (Seal)

By Attorney in Fact,

JOHN WATTS. (Seal)

ATWATER WARDWELL, (Seal)

By Attorney in Fact,

JOHN WATTS. (Seal)

DAVID W. BOULDIN.

Signed, sealed and delivered in presence of

B. H. DAVIS,

DAVID K. OSBORN.

Recorder's Office, Tucson, Pima Co., A. T. Filed and recorded at request of Wells Fargo & Co., 25th March, A. D. 1885 at 3:45 P. M., in Book 13, Deeds of Real Estate, Pages 13 to 18 inclusive.

A. B. SAMPSON,

County Recorder." [246]

Territory of New Mexico, County of Santa Fe.

I, John Gray, Clerk of the Probate Court and exofficio Recorder in and for the County of Santa Fe, in the Territory of New Mexico, certify that the foregoing instrument was filed in my office for record on the 24th day of April, A. D., 1885, at nine o'clock A. M., and the same is duly recorded in book "N" the Records of Deeds of said county of Santa Fe, on pages 86, 87, 88, 89, 90 and 91. In Witness Whereof I have hereunto set my hand and seal this 24th day of April, A. D., 1885.

[Seal] JOHN GRAY,

Clerk and Ex-officio Recorder Santa Fe County, Territory of New Mexico, per M. Garcia, D. C.

Territory of Arizona, County of Pima.

Before me, Frank P. Clark, clerk of the court of El Paso County, State of Texas, it being a court of record having a seal, on this the 14th day of April, A. D., 1888, personally appeared R. H. Davis who is personally known to me to be the person whose name is subscribed to the within conveyance as a witness thereto, and after being duly sworn by me stated on oath that John Watts whose name is subscribed to the within conveyance as a party thereto and as the attorney in fact of the other grantors, to wit: Elizabeth A. Wise, Fanny A. Bancroft, Mary A. Wardwell, Louise Wardwell, J. Howe Watts, A. L. Bancroft, and Atwater Wardwell, is the person described in and who executed said deed for himself, and as

attorney in fact for the other grantors therein, that he saw the said John Watts subscribe said conveyance for himself and as attorney in fact for the other aforesaid grantors, on the day of its date, [247] and that the said R. H. Davis and the other subscribing witness subscribed their names thereto as subscribing witnesses thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said county court of El Paso County, State of Texas, on this the 14th day of April, 1888, at 2:30 P. M.

[Seal]

FRANK P. CLARK,

Clerk County Court El Paso County, Texas.

Filed and recorded at request of D. W. Bouldin, 18th April, A. D., 1888, at 2:30 P. M.

A. B. SAMPSON,

County Recorder.

Santa Cruz Development Company objected to the admission of said paper for the following reasons and upon the following grounds: [248]

First, that it is not a deed of conveyance but an executory contract; second, that there is no proof recited in the deed of any authority in John Watts to execute the paper in behalf of Elizabeth A. Watts, his mother, in behalf of J. Howe Watts, his brother, or in behalf of his sisters, Mary A. Wardwell and Louise Wardwell and Fanny A Bancroft. Third, that the deposition taken by Mr. Franklin of John Watts entirely negatives any authority in him to execute this paper in behalf of his mother, his brother and his sisters. Fourth, that there is no evidence of any authority in John Watts and any

possible presumption is negatived by the deposition of John Watts that there was any power of attorney in writing and acknowledged, as then required by the laws of the State of Arizona.

The COURT.—The objection is overruled for the present. The paper is received subject to the objection.

Santa Cruz Development Company noted an exception to said ruling.

Plaintiffs objected to the introduction in evidence of said paper at the present time for the reason that the conveyance of 1870 from John Watts, the father of all of these heirs, conveyed the title to Christopher E. Hawley, and that, therefore, at the time of the execution of this paper in 1884, the heirs of John S. Watts had no title and nothing to convey. Therefore, under the present avowals, under the condition of this case as it now stands this paper is inadmissible as against the plaintiffs.

The COURT.—The same ruling and exception allowed plaintiff. [249]

Defendants Wise Exhibit 17.

Defendants Wise then offered in evidence certified copy of the first record of the instrument from John Watts and others to David W. Bouldin, of date September 30, 1884, same as Defendants Wise Exhibit 16, without acknowledgment, heretofore printed in full.

Santa Cruz Development Company and plaintiffs objected to the introduction of said instrument on the grounds heretofore set forth to the introduction of Defendants Wise Exhibit 16, and made the fur-

ther objection that the paper in question is not acknowledged for admission in evidence according to the laws of Arizona; that the paper was not entitled to record not being acknowledged, and next, that there is no proof, and as this is an exemplified copy of an unacknowledged paper it requires proof of signature to papers.

The paper was received subject to objection and marked Defendants Wise Exhibit 17.

Testimony of John Watts.

Defendant Joseph E. Wise then introduced in evidence the deposition of JOHN WATTS which was duly taken and duly returned to this Court wherein said John Watts was duly sworn and examined as a witness in behalf of defendant Joseph E. Wise, and in the said deposition testified as follows:

Direct Examination.

My name is John Watts, age 74 years, residence Newton, Kansas. I have lived in Newton, Kansas for about 21 years. For about 20 years I was a banker, about 24 years in Government service as a National Bank Examiner, National Bank Special and [250] National Bank Receiver. John S. Watts was my father; he is dead, he died in Bloomington, Indiana on June 11th, 1876. He left surviving him a wife, my mother, Elizabeth A. Watts, he also left surviving him besides myself, my only brother, J. Howe Watts, three sisters, Mary A. Wardwell, who subsequently married W. V. B. Wardwell, Louise Watts, who subsequently married Atwater Wardwell, and Frances A. Watts, who subsequently

sequently married A. L. Bancroft. There were no deceased children of my father at the time of his death. At the present time my youngest sister, Louise Wardwell, is dead. She died in Berkeley, California about ten years ago. My deceased sister, Louise Wardwell, left her surviving one son, Ralph W. Wardwell, present residence Bakersfield, California. The husband of Louise Wardwell is not living; he died about twenty years ago. My mother Elizabeth A. Watts is dead; she died in Berkeley, May 23, 1893. My father John S. Watts was not married more than once.

I am the same John Watts, who, on or about 30th day of September, 1884, executed to one David W. Bouldin, for myself individually, and as attorney in fact for Elizabeth A. Watts, Frances A. Bancroft, Mary A. Wardwell, Louise Wardwell, J. Howe Watts, Albert L. Bancroft and Atwater Wardwell a certain instrument dated the 30th day of September, 1884, purporting to remise, release and quitclaim to the said David W. Bouldin, certain lands therein described, said instrument having been recorded at pages 13 to 18 inclusive in book 13 of deeds of Real Estate, in the office of the county recorder of Pima County, then Territory of Arizona. There is presented to me a certified copy of this instrument for identification; I think it is a correct copy.

(The notary taking the deposition was requested to attach [251] to and file with the testimony and deposition of John Watts this certified copy of said instrument just above referred to and mark the same

Defendant Joseph E. Wise Exhibit "A" and the same was annexed to the deposition and is the same as Defendants Wise Exhibit 16.)

Question.—Did the said Elizabeth A. Watts, Fanny A. Bancroft, Mary A. Wardwell, Louise Wardwell, J. Howe Watts, A. L. Bancroft and Atwater Wardwell, on the said 30th day of September, 1884, or at any time prior thereto, execute and deliver, or cause to be delivered to you, any instrument in writing, a power of attorney, authorizing you as their attorney in fact or agent to execute said instrument exhibit "A."

Objected to by the Santa Cruz Development Company as incompetent, immaterial and irrelevant; as not the best evidence and as calling for a conclusion and as asking the witness to testify to the contents of a written instrument.

Evidence received subject to the objection without waiving any rights.

WITNESS.—Yes, I am sure that I had authority to represent them, but whether that was a formal power of attorney or letter of instructions I do not now remember.

Question. Do you now have or have you been able to find any such power of attorney or any other writing or instrument, letters or otherwise, from said parties or any of them, authorizing you to act as their attorney in fact in said matter.

A. No, sir.

WITNESS.—It is possible that there may be some authority among the papers that I have, but so

far I have been unable to find them. I have looked carefully therefor since notified that my deposition would be taken, but so far have been unable to find It is doubtful whether I could find any as a large number of the papers are not in my possession. I was served with the subpoena duces tecum commanding me to appear at this time and place and to bring with me any power of attorney or any other instrument from said parties authorizing me to execute the instrument in question (instrument of September 30th, 1884). It was served on me on October 20th, 1914, at Newton, Kansas. Since the service of said subpoena I have made diligent search and endeavored to find any power of attorney or other instrument in writing and any letters in writing from said parties or any of them, which designate me as their agent or attorney in fact to act for them in the matter of the execution of said instrument (the instrument of September 30th 1884) or that gave me authority to act for said parties or any of them, as their agent or attorney in any capacity, and found only copies of two powers of attorney made in 1894, ten years after the instrument in question.

Question. What is your recollection as to whether or not the power of attorney or powers of attorney or other instruments in writing from the members of your family as shown by the instrument of September 30th, 1884, was all in one instrument or in two instruments.

Objected to by Santa Cruz Development Company

as incompetent, irrelevant, immaterial, and as calling for a conclusion and as asking the witness to testify to the contents of a written instrument executed over thirty years ago.

The COURT.—That may be received subject to the objection.

WITNESS.—My impression is that there were two instruments, one from my mother and sisters and the other from my brother.

Question.—Were these instruments formal powers of attorney signed and acknowledged before a notary? A. I couldn't say. [253]

Question.—What is your recollection as to whether one or both of the instruments were in the form of a letter or in the form of a formal power of attorney?

A. I am not sure on that point. My impression is that I had both. First letters and then powers executed.

Referring to the instruments which were designated as a power of attorney which were signed by my brother, J. Howe Watts, I cannot remember whether or not such instrument was acknowledged before a notary public. At that time I was familiar with the signature of my brother, J. Howe Watts. The instrument which I refer to as the power of attorney contained his genuine signature. I am not able at this time to state whether or not the power of attorney, that is, the formal instrument from my mother and all the other parties for whom I signed the instrument of September 30th, 1884, except my brother, was acknowledged before a notary or other

officer authorized to take acknowledgments. I was familiar at that time with the signature of my mother and the names of the other parties to said power of attorney except that of Atwater Wardwell, husband of my sister, Louise Wardwell. Referring to the signatures of Elizabeth A. Watts, Fanny A. Bancroft, Mary A. Wardwell, Louise Wardwell and A. L. Bancroft on said instruments, those signatures were the genuine signatures of each of said parties.

Question. Do you remember the contents of the instrument from your brother, J. Howe Watts, as to whether or not the said instrument gave you authority to execute the instrument or deed, a certified copy of which is attached and marked as Defendants' Wise Exhibit "A."

A. I think it was a general power of attorney.

Question. I will ask you to state whether or not its terms [254] were such that it authorized you to make and execute and deliver any deed or deeds or contract or other conveyance affecting the premises described in the said instrument of Sept. 30th, 1884?

A. I so understood it.

Question. Is it now your recollection that said instrument did contain such authority?

A. It is my impression.

Question. Referring now to the power of attorney from your mother, Elizabeth A. Watts, Fanny A. Bancroft, Mary A. Wardwell, Louise Wardwell, A. L. Bancroft and Atwater Wardwell you may state whether such power of attorney gave you authority to make, enter into, execute and deliver such deed or

deeds or contracts or conveyances or other instruments affecting the premises described in said instrument of Sept. 30th, 1884, if you saw it.

A. Yes, sir, that was its object.

WITNESS.—It is my recollection that such instrument contained such authority the power of attorney was general in its terms. I had several letters from the parties whose names I signed to the instrument of Sept. 30th, 1884 bearing upon the question of my authority to make any contract or deed or conveyance on behalf of said parties concerning the premises described in said instrument of Sept. 30th, 1884; I had several such letters asking me to dispose of any and all interests that I could find in which the heirs were interested. I received no letters from A. L. Bancroft or Atwater Wardwell. I received a few from my mother and several from my three sisters and my brother. I do not now have the said letters or copies of them. I have made a general examination of my letters and records pertaining to this matter but have found nothing that I supposed was material. I have not found any letter or letters or other instruments from any of said parties whose names I signed to said instrument of Sept. 30th, 1884, [255] which in any manner gave me any authority whatever in reference to the settling of my father's estate or the making of any deed or deeds or conveyances or contracts affecting the premises described in the instrument of Sept. 30th, 1884. The power of attorney from my brother, J. Howe Watts and the power of attorney from my mother

and the other parties whose names I signed to the instrument of Sept. 30th, 1884 and the letters which I have referred to were signed and were received by me prior to the execution of said instrument of the 30th day of Sept., 1884.

Question. I will ask you to state whether or not you, at any time subsequent to the execution of said instrument of Sept. 30th, 1884, made known to any or all of the parties whose names you signed to said instrument, the nature of the instrument which you had executed for them as their attorney in fact?

Mr. KINGAN.—We understand that all this evidence as against the plaintiffs is going in subject to objection.

The COURT.—Yes.

Mr. JOSEPH W. BAILEY.—You mean your general objection that in 1884 the Watts family had nothing to convey or to make a contract about with anyone; is that it?

Mr. KINGAN.—Or for any other reason?

Mr. JOSEPH W. BAILEY.—I understand that it is going in subject to any objection we may make.

The COURT.—I understand that you are objecting to this line of testimony on the theory that at this time these grantors had nothing to convey, and that objection is in the record. If you have any specific objections you should state them at the conclusion of the reading of this deposition.

To the question above set forth the witness answered: Yes, sir. [256]

WITNESS.—I did not ever show the said instru-

ments or a copy thereof, to said parties or any of them subsequent to the execution of the same. I did inform my mother Elizabeth A. Watts by letter of the execution of the instrument in question the instrument of September 30th, 1884. I do not remember whether it was by more than one letter. Before the contract was made I sent the letters of recommendation that Mr. David W. Bouldin had presented to me and also the terms of the contract that he wanted to make with me for the information of my mother, my sisters and brother. Afterwards I wrote nothing in regard to its terms additional. mitted to them in substance the terms of this instrument of Sept. 30th, 1884, prior to its execution by me for them; it was not a copy, it was simply a statement of the terms and I sent it to them for their approval or rejection; that was prior to the execution of the said instrument signed by me for them. The instrument of Sept. 30th, 1884 was executed after I had received word from my mother and the other parties whose names I signed to said instrument, accepting the proposed terms. Generally speaking the instrument of Sept. 30th, 1884 was prepared in accordance with the terms and conditions as outlined to said parties whose names I signed; there were some modifications that I made to the contract; I regarded the changes or modifications as substantial or material, especially in regard to the expenses that would be necessary in the prosecution of the matter, in clearing up title; I wanted it absolutely and distinctly shown that none of the heirs were to

bear any expense of any kind whatever. I think there were a few changes made other than those about expenses which I have designated but I do not recollect what they were; I would not have made them if I had not thought they were important. I do not remember any other changes that changed [257] the general terms or conditions or the nature of the transaction between the parties whose names I signed to said instrument of Sept. 30th, 1884 and David W. Bouldin. I will state that the instrument of Sept. 30th, 1884 was prepared generally to correspond with the terms and conditions that were submitted by me to my mother and other parties whose names I signed to said instrument prior to the time of the execution of the same; I will also state that the matter of closing the transaction, that is the instrument based upon the tentative arrangement between Bouldin and the parties whose names I signed to said instrument were left to me. I never received at any time in any manner any notification from any of the parties whose names I signed to said instrument in any way disaffirming my act in signing their name or names to said instrument; I never received any notice or protest from any of said parties in any manner protesting as to any of the terms or conditions that were included in said instrument after the submission of the terms to them. As far as I know the parties whose names I signed to said instrument and each of them were satisfied with the instrument. Subsequent to the execution and delivery of said instrument, as soon as it was com-

pleted, I think I notified my mother, Elizabeth A. Watts and each one of the heirs that I had executed and delivered said instrument; that is now my recollection and I did not at that time or at any time since that time receive any protest from any of the parties. I have not found in my search for papers in this matter any letter or letters from any of said parties which in any manner tend to confirm my action in signing said instrument for said parties.

I am acquainted with one James W. Vroom of the city of New York. I did execute and deliver an instrument to said James W. Vroom affecting the tract in the Territory now state [258] of Arizona called or known as Baca Float No. 3 or Baca Location No. 3. On or about the 25th day of October, 1899, I did execute a certain quitclaim deed to said James W. Vroom, remising, releasing and quitclaiming to him an interest in and to said tract Baca Location No. 3 or Baca Float No. 3. I am the same John Watts who executed the instrument above referred to to James W. Vroom, as attorney in fact for Mary A. Wardwell, Louise Wardwell, Frances A. Bancroft and Albert L. Bancroft. I have known said James W. Vroom about twenty years. I met him before the execution of the quitclaim deed to him of October 25, 1899. I talked with him concerning this intended transaction. I informed him that I had prior to that time entered into, executed and delivered an instrument in reference to said described premises, the instrument to David W. Bouldin under date of Sept. 30th, 1884. I think I in-

formed said Vroom of that fact both by letter and by conversation. I do not now have any letter by which I so informed him, nor a copy of such letter.

Question. Did you inform said Vroom any time prior to the execution of said quitclaim deed, dated October 25, 1899, that you had authority from Elizabeth A. Watts, Fanny A. Bancroft, Mary A. Wardwell, J. Howe Watts, A. L. Bancroft and Atwater Wardwell to execute for them as their attorney in fact, said instrument dated Sept. 30th, 1884 to the said David W. Bouldin? A. Yes, sir.

Question. Did you inform James W. Vroom that you had authority from said parties and each of them in writing to execute said instrument of date Sept. 30th, 1884, to said David W. Bouldin?

Objected to by Santa Cruz Development Company as calling for a conclusion and the contents of a written instrument, and [259] its counsel suggested that the answer be taken subject to the objection.

The COURT.—Well, I think I shall hold that counsel have waived their objections if they do not call my attention to those they insist on at the close of the case. For instance, in this instance, I am prepared right now to overrule the objection because it just calls for a statement of fact.

Mr. BREVILLIER.—I will object to your Honor's ruling there and make a note of an exception.

The WITNESS.—Answered yes, sir.

The WITNESS.—This was prior to the execution of the quitclaim deed to Vroom; I do not remember

whether I gave him such information in more than one letter. I did inform said Vroom of such facts in reference to the execution of the instrument to David W. Bouldin in one or more conversations that I had with him; those conversations were held in Newton; no one else was present.

I am the same John Watts to whom J. Howe Watts, Albert L. Bancroft, Frances A. Bancroft, Mary A. Wardwell and Louise Wardwell executed a quitclaim deed dated on or about the 26th day of October, 1899, remising, releasing and quitclaiming to me all their right, title and interest in and to the said tract commonly known as Baca Float No. 3. I wrote to my brother and sisters about the deed dated October 25, 1899, which, I for myself and as attorney in fact for them, executed to said James W. Vroom. I kept no copies of the letters nor have I the originals.

Question. Will you kindly explain fully why on October 25, 1899, you executed said deed to James W. Vroom as attorney in fact for said parties, and why shortly thereafter the said parties executed their quitclaim deed to you. [260]

The WITNESS.—It was for convenience in handling the property.

The WITNESS.—Referring again to the powers of attorney and letters which I have testified to pursuant to which I executed the instrument to David W. Bouldin under date of Sept. 30th, 1884, I will state that these papers were delivered to said James W. Vroom; I cannot give the exact date; it was be-

fore the execution of the deed dated October 25, 1899. I could not state definitely what papers were delivered to said James W. Vroom; a great many. Mr. Vroom was here in Newton and examined personal papers of my father's relating to this subject and took such as he deemed material or important. My recollection is that he volunteered to place of record the powers of attorney from the parties in whose behalf I signed the said instrument to David W. Bouldin, dated Sept. 30th, 1884; that is he promised me that he would place such powers of attorney of record as were necessary. I could not say whether or not the fact that Mr. Vroom agreed to place said powers of attorney of record refreshed my recollection as to whether or not the same were acknowledged before some officer authorized to take such acknowledgments. I think all the papers were sent to Mr. Vroom before the execution of the deed to Vroom of October 25, 1899. It is hard to give a satisfactory answer to the question as to when I sent those papers to Mr. Vroom; Mr. Vroom was in Santa Fe, New Mexico, examining the title and requested me to send the papers there to him. I did so, a good sized trunk full and have sent no papers since I couldn't state positively as to whether I sent this trunk of papers to Mr. Vroom before or after the execution of the deed to Vroom which was dated October 25, 1899. Prior to 1899, Mr. Vroom had acted as my attorney for five years or more. [261]

Cross-examination.

Upon cross-examination by Mr. Brevillier, counsel

for Santa Cruz Development Company, John Watts the witness testified as follows:

My father did not leave a will; my mother did not leave a will. In 1870 my father was a resident of Santa Fe, New Mexico, he had been a resident of the Territory of New Mexico for many years prior thereto; for over forty years. My father during his lifetime had been a delegate to Congress from New Mexico and also Justice and Chief Justice of the Supreme Court of New Mexico. I think that my father gave up his legal residence in New Mexico about 1873, somewhere about there; then he made his home in Bloomington, Indiana, and he was a resident of Bloomington Indiana continuously thereafter until the date of his death. My mother did not remarry after my father's death; and neither my father nor my mother were married more than once. My sister, Mrs. Bancroft, I have spoken of as Frances A. Bancroft, Fanny Bancroft, Fanny A. Bancroft and Fanny W. Bancroft. The date of my father's marriage to my mother was about 1836. My attention is directed to a deed recorded in the office of the recorder of Santa Cruz County, Arizona, on June 16, 1913 at 1:30 P. M. in book 7 of Deeds of Real Estate pages 261 et seq. As to the signatures there opposite the three words "Seal" I will state the first is mine and the other two are my wife's. married in 1880. I have been married only once. I think the recitals or statements of fact in that last named instrument are correct or approximately correct. After my father's death my mother lived in

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(Testimony of John Watts.)

Berkeley, California and continued to be a resident there until the time of her death. At the time of my father's death I lived in [262] Santa Fe, New Mexico. I lived there over fifteen years after my father's death. Then I resided in Missouri for about one and one-half years and then came to Kansas and have been a resident of Kansas ever since. At the time of my father's death I think that my brother, J. Howe Watts, resided in Arizona, for a while he was a resident of Arizona, for a number of vears he was a resident of Honduras, Central America, and in the mining business in Mexico and now resides in San Pedro, California. He has lived in San Pedro about a year and a half. He lived in Arizona about three or four years after my father's death; he lived in Central America about ten years; in Mexico between two and three years. Mary A. Wardwell at the time of my father's death resided in Berkeley, California, and she is still living in Oakland, California. Mrs. Louise Wardwell resided at the time of my father's death in Berkeley, California and resided there until the date of her death. Mrs. Bancroft resided at the time of my father's death in San Francisco, California. She has lived there ever since and is living there now.

Question. Referring to the paper of Sept. 30, 1884, known as the Joseph E. Wise Exhibit "A," did you ever get any money from David W. Bouldin for signing the paper.

Mr. Weldon M. Bailey and Mr. Franklin objected to the question as an attempt to vary the terms of a valid written instrument, which recites on its face

a valuable consideration, also that it was incompetent, irrelevant and immaterial and not proper cross-examination.

The objection was sustained by the Court to which ruling counsel for Santa Cruz Development Company then and there duly excepted.

Counsel for Santa Cruz Development Company then asked [263] the Court to take the answer under Rule 46.

The COURT.—The question and answer are both taken under Rule 46.

To the question the witness answered: No, sir.

The following questions were also asked and objected to by counsel for the Bouldins and for Joseph E. Wise on the grounds just above stated, and the objections thereto were sustained by the Court.

Counsel for Santa Cruz Development Company excepted then and there to the ruling of the Court; at his request said questions and answers were taken under equity rule 46 as follows:

TESTIMONY TAKEN UNDER RULE 46.

Question by Mr. BREVILLIER.—Did any of the other heirs get anything from Bouldin?

A. No, sir, not to my knowledge.

Question. You were the only one to participate in the transaction with Bouldin?

A. Yes, sir I was the only one.

END OF TESTIMONY TAKEN UNDER RULE 46.

Counsel for Santa Cruz Development Company then asked the witness the following questions:

When you told your mother, brother and sisters about the proposed transaction with Bouldin, did you tell them that Bouldin wanted an absolute transfer or to be retained as attorney on a contingent fee.

To this question counsel for the Bouldins and counsel for Joseph E. Wise objected on the ground that what he told them couldn't bind either Bouldin nor his successor in interest; and on the further ground that this was not proper cross-examination for the reason that the witness never said that he told them anything. [264]

The COURT.—It may be received under the defendants Wise and Bouldin objections, and I will ask you to call my attention to it later.

Thereupon counsel for Joseph E. Wise duly excepted to the ruling of the Court.

To this question the witness answered: That was to be the understanding. It was agreed what he was to do and have a fee for his services.

Question. Did David W. Bouldin ever claim to you that he had an absolute two-thirds interest in the property in fee?

To this question counsel for Wise and counsel for Bouldin objected on the ground that it was immaterial whether he made any such claim or not, and not proper cross-examination and that it is an attempt to vary a valid written instrument by parole evidence.

The COURT.—You may proceed over the defendants' objections.

To which ruling of the Court the defendants Wise

(Testimony of John Watts.) and Bouldin then and there excepted.

(Witness answered:) No, sir.

Question. I show you an instrument in writing and ask you if you recognize the writing on the paper in question and the endorsements thereon.

A. David W. Bouldin's.

The WITNESS.—I am familiar with his signature; I have seen him write; that writing is David W. Bouldin's; I don't remember whether I received that by mail; the endorsements on the back are mine.

(The notary who took the deposition was requested by Mr. Brevillier to mark this "Exhibit 1" for identification, written on three sheets of paper and fastened together.) [265]

WITNESS.—My father was attorney for the Baca heirs for a number of years.

Question. Did you have any power of attorney or authority from your brother, sisters and mother or any of them, to transfer their interest or any part of Baca Float No. 3 to any person except in the nature of a sale. In other words, did you have any authority to make any conveyance of their interest, or any part thereof, without receiving a consideration therefor?

A. No, sir.

WITNESS.—(Continuing.) That paper of September 30th, 1884, the contract with Bouldin, was executed in Santa Fe, New Mexico, or in El Paso, Texas, I am not sure which. I first became acquainted with David W. Bouldin shortly before this agreement was made. I did not have any business transaction with him before because he was an entire

stranger. He came with letters of recommendation. Those letters stated that he was a good business man, conversant in land matters and a generally efficient man in business. He told us that he wished to represent me, my brother, mother and sisters with reference to Baca Float Nos. 3, 2 and 4.

Question. He told you that he was willing to act for you on a contingent basis and that was the understanding, and that unless he was successful in the matter he would get nothing?

A. He would get nothing, and would lose his time and expense.

WITNESS.—I saw Mr. Bouldin once afterwards in San Francisco about two years afterwards, in 1886 or 1887. I did not ask him at various times for a copy of that paper of Sept. 30th, 1884. (Witness' recollection was refreshed by being shown "Exhibit 1" for identification.) I did ask him for a copy of that paper. I had a good many communications with [266] my mother, my sisters and my brother with reference to various Baca Floats, and of deals with reference to them; and some of the letters and powers of attorney were with reference to other Floats than Baca No. 3. In 1884 I was acting informally in their behalf in closing up my father's estate, and I considered the matter as a family matter, in which the usual form and formalities applicable to business transactions among strangers were inapplicable. These powers of attorney and letters, etc., about which I have been interrogated covered a period of about twenty years.

Question. And you cannot give the approximate date of any of them?

A. It is with difficulty that I can locate them.

WITNESS.—I would say that W. V. B. Wardwell died about twenty-five years ago.

WITNESS.—There were among the papers that I turned over to Mr. Vroom a lot of papers not applicable to Baca Float No. 3, a large number of them; they were odds and ends of my father's estate.

WITNESS.—My father was a man of wide acquaintance and a great reader. He was a member of the bar of New Mexico and he had quite a wide and varied experience as a lawyer and argued a few cases in the Supreme Court and was associated with eminent Eastern counsel in these cases. In 1870 my father had quite a wide familiarity with real estate forms and transactions; he had to my knowledge handled and drawn many deeds and other papers affecting real property.

WITNESS.—I do not recollect what was in that trunk of papers that I sent to Mr. Vroom; they were supposed to contain a large amount of his business letters, memoranda and copies; and particularly with reference to my father's own [267] correspondence and affairs while he was living. I think that when Mr. Vroom was here he went over all the papers with reference to Baca Float No. 3; I don't remember what he took away with him, he said he selected what was important. At that time there was considerable controversy in the Land Office Department and in the Interior Department with reference

to Baca Float No. 3 and Mr. Vroom and myself were interested in securing favorable action fom the Land Department and the question of conflicting titles among the various claimants to the ground I regarded as secondary, Mr. Vroom and myself at that time both regarded as of primary importance the securing of favorable action by the Land Department and the Interior Department and I think that most of the papers with reference to the Baca Float No. 3 which Mr. Vroom took or retained were with reference to the status of the title as against the Government.

Question. Did you ever tell your mother and your sisters and your brother or any of them that you had made an absolute conveyance or deed to David W. Bouldin.

A. Absolute conveyance? No, indeed.

Question. Did you ever regard the paper as a deed or conveyance?

Objected to by defendants Bouldin and Joseph E. Wise on the ground that it was absolutely immaterial how he regarded that paper.

Objection sustained and exception taken by the Santa Cruz Development Company and answer taken under Rule 46.

Answer: No.

The following questions were each and all objected to as immaterial and the objection thereto sustained by the [268] court, and each of said rulings were excepted to by Santa Cruz Development Company and all of said questions and answers were, at the

request of Santa Cruz Development Company taken under Rule 46.

Question. Did Bouldin in your presence ever speak of it in that light? A. No.

Question. Did he always call it a contract?

A. Agreement or contract. Sometimes he would say "our agreement" and sometimes "our contract."

END OF TESTIMONY TAKEN UNDER RULE 46.

WITNESS.—In September, 1884, I and various other members of my family thought there was money coming to us from Baca Float No. 4 in Colorado. In a general way I was acquainted with the legal status of Baca Floats Numbers 2, 3 and 4, but not with the particular legal details or particular status. Neither my father nor my mother ever adopted any child or children.

The witness further testified on cross-examination as follows: I could not say whether the papers which Mr. Vroom agreed to record were papers other than the letters and powers of attorney and were only title deeds from the Baca heirs; he said he would record what was important and material. I turned over to him several title deeds which at that time had not been recorded. I never heard at all that any claim was made by David W. Bouldin or his grantees that the paper of September 30th, 1884, was a deed of conveyance until you stated it to me yesterday. On September 30th, 1884, David W. Bouldin had done no work for me, my mother, my brother, sisters, or any of them; I didn't know the man. [269]

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(Testimony of John Watts.)

Redirect Examination of the Witness JOHN WATTS.

The witness JOHN WATTS on redirect examination further testified:

There was a dispute or disputes or questions as to the validity of this title to Baca Float No. 3 at the time and prior to the execution of this instrument of Sept. 30th, 1884; I do not know how much Mr. Bouldin did in attempting to clear up the title as provided in said instrument of Sept. 30th, 1884. do not know how much money, if any, he spent in attempting to clear up the title. I do not know whether or not Mr. Bouldin did everything within his power that he agreed to do as contained in said instrument of Sept. 30th, 1884. I did not receive any consideration from Mr. Vroom for the deed of October 25, 1899; no money consideration; no property; nor did I receive any money or any property from Mr. Vroom for the conveyance of 1899, for or on behalf of any of the other heirs.

Recross-examination of JOHN WATTS.

On recross-examination by Mr. Brevillier the witness John Watts further testified: I executed two deeds to Mr. Vroom in 1913; I was paid money consideration for both of those deeds. Prior to October, 1899, Mr. Vroom had done considerable work for me and the heirs with reference to Baca Float No. 3, and other matters, and the deed to Vroom of October 25, 1899, was partially in consideration of those services.

At the time I entered in to the arrangement of

Sept. 30th, 1884, with Bouldin he told me that he would clear up the situation for me and the heirs and it was reliance upon this statement that caused me to enter into this written contract with him. [270] Indeed, there was no reason at that time that I and the other heirs should make him a conveyance of a two-thirds interest in these Floats.

Redirect Examination of JOHN WATTS.
(By Counsel for JOSEPH E. WISE.)

Mr. Vroom paid to me all the consideration that was paid for the deed of February 3d, 1913, to James W. Vroom; no part of that consideration was paid by Mr. Vroom to any of the other heirs; the consideration was paid to them by me, to each of the heirs. It was paid for the entire interest in Baca Float No. 3.

Recross-examination of JOHN WATTS.

(By Counsel for Santa Cruz Development Company.)

In paying the money over to the heirs I acted as their agent or trustee and not in behalf of Mr. Vroom and the arrangement between the heirs and myself was something that no one knew about except them and myself and was the result of a family arrangement or family agreement which was purely private and known to no one except the members of the family.

Question. Why did you enter into the arrangement on September 30th, 1884, with Bouldin?

A. Because I believed from the representations he

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(Testimony of John Watts.)

made that he would be able to quiet the title to the float.

Question. And relied upon these representations and his performance thereof and made the contract with him? A. Yes.

Question. Did you ever tell your mother, your sisters or your brother or any of them, that you had ever made any deed or conveyance to Mr. Bouldin?

A. I never did. [271]

Question. And you never so regarded the papers? Objected to by Joseph E. Wise and Bouldins on the ground that it was immaterial how he regarded it.

Objection sustained and exception taken by Santa Cruz Development Company and question and answer taken under Rule 46.

Answer.-No.

The following question was also objected to by defendants Wise and Bouldins as immaterial and objection sustained. Exception taken by Santa Cruz Development Company and question and answer taken under Rule 46, to wit:

Question. And never heard any one speak of it in that light? A. No, sir.

Redirect Examination of JOHN WATTS.
(By Counsel for JOSEPH E. WISE.)

I have never seen the powers of attorney or other letters from my mother, Elizabeth A. Watts, or other parties whose names I signed to the instrument of Sept. 30th, 1884, since the same were given to Mr. Vroom; it looks most probable that Mr. Vroom would have them. I had such powers of attorney in my

possession or under my control prior to the time that the papers in reference to the matter were delivered to Mr. Vroom and I don't think he ever returned to me either of the powers of attorney pursuant to which the instrument of Sept. 30th, 1884, was executed. I have no definite recollection of those two powers of attorney having been delivered to Mr. Vroom; I couldn't say positively that they were with other papers that were delivered to him; he did the sorting of papers himself. I authorized him to take all papers that might affect this Baca Float No. 3. [272]

Question. As far as you know were the powers of attorney in question among the papers that he looked over or sorted?

A. I can hardly state that fact as I don't know what he took and what he didn't.

WITNESS.—I have never been able to find either of those papers since that time nor any of the letters concerning which I testified this morning.

Recross-examination of JOHN WATTS.

(By Counsel for SANTA CRUZ DEVELOPMENT COMPANY.)

WITNESS.—Before I turned over these papers to Mr. Vroom or gave him permission to look over them I had looked for some of those letters and powers of attorney several times and had been unable to find them.

Question. Well, then your inability to find those papers preceded your turning over the papers to Mr. Vroom, as well as his inspection of those papers?

A. Well, some would precede and some would follow.

Question. Some of this authority that you relied on was contained in general letters that were written by your brother, J. Howe Watts, and your mother and sisters respectively, to you as purely a family or affectionate matter. A. Ves.

Question. Some of them being mostly family letters were destroyed by you? A. Yes.

WITNESS.—(Continuing.) So the authority that I spoke of was contained very largely in purely family letters from some member of the family to me dealing with purely family and personal incidents and these letters as a rule were destroyed after I had read and answered them.

I had a good many dealings with reference to my father's estate; I would hardly say that Baca Float No. 3 [273] was comparatively the most unimportant; there were some matters that I regarded as more important. I had powers of attorney and then letters that I spoke of to look into such and such matters in which the heirs were interested. All those letters and powers of attorney were mostly general in their nature and not at all specific. Some of the letters authorized me to close up my father's estate and to make contracts in reference to it.

In the course of my official duties as bank examiner and bank receiver I have moved about considerably from place to place and while I acted as bank receiver I have established a temporary residence for months at a time in places other than Newton,

and in that way there has been some trouble with my papers. It is not likely that these letters and powers of attorney I spoke of are now reposing in the vaults of some defunct bank; they would be in my retained papers after I had settled with the bank, brought home in what are called retained papers. I have still a lot of the odd and ends of my father's papers.

Redirect Examination of JOHN WATTS.
(By Counsel for JOSEPH E. WISE.)

I had the powers of attorney from my mother and other parties for whom I signed the instrument of Sept. 30th, 1884, prior to the time that I took up the negotiations with Mr. Vroom and prior to the time that any of the papers were delivered to him. Up to that time they had not been lost or misplaced; they were among my other papers. [274]

Recross-examination of JOHN WATTS.

(By Mr. BREVILLIER, Counsel for SANTA CRUZ DEVELOPMENT COMPANY.)

Since that time I have moved about a great deal and taken papers with me.

Question. And you cannot state of your own knowledge whether or not Mr. Vroom ever got, secured or kept in his possession any of those letters or powers of attorney? A. I couldn't state.

Question. And any answer that you have made to the effect that he probably has the same is a surmise on your part or guess as to the probability?

A. Yes.

Demand was made by counsel for defendant Jos-

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(Testimony of John Watts.)

eph E. Wise upon James W. Vroom, who it is admitted is president of the defendant Santa Cruz Development Company, that he produce the powers of attorney which the witness John Watts testified to as set forth in the foregoing deposition and testimony of said witness John Watts. To this demand James W. Vroom answered that he did not have the powers of attorney, or either of them, and never had the same or either of them, and never heard of said powers of attorney, although he once had in 1913 an informal letter, dated in 1894, signed by some of the heirs of John S. Watts, a copy of which had been exhibited by John Watts at the time of taking the deposition.

Defendants Wise Exhibit 18.

Defendants Wise introduced in evidence without objection certified copy of the record of a deed or instrument dated and acknowledged the 21st day of February, 1885, and recorded June 19, 1885, from David W. Bouldin to John Ireland and Wilbur H. King, which without the statement of parties habendum [275] signatures and acknowledgments, and omitting the description by courses and distances, which are those of the 1863 location, reads as follows:

"Witnesseth, that the party of the first part for and in consideration of the sum of two thousand dollars to him in hand paid by the parties of the second part, the receipt of which is hereby acknowledged, and for the further consideration of an additional two thousand dollars to be paid in the future to the party of the first part by the parties of the second part, and evidenced by a promissory note duly signed by the said John Ireland and the said Wilbur H. King, bearing even date herewith for the said sum of two thousand dollars and payable to the said David W. Bouldin on the first day of September, 1885, and the further consideration, covenant and agreements to be performed by the parties of the second part, hereinafter mentioned in confirming and quieting title to the lands hereinafter described, has granted, bargained and sold, and by these presents does grant, bargain, sell and convey unto the said parties of the second part, and to their heirs and assigns forever, all and singular the undivided one-third of one-third of all right, title and interest owned, controlled and possessed by the party of the first part, of, in and to the following described tract or tracts or parcels of land, to wit, Location Number Three (3) being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the Sixth Section of an Act of Congress of the United States approved June 21st, 1860, entitled "An Act to confirm certain private land claims in New Mexico," and found in Volume twelve (12), page 72, of the United States statutes at large, by the heirs of Don Luis Maria Cabeza de Baca, the [276] title to said five tracts of land having been confirmed to the said heirs of Don Luis Maria Cabeza de Baca, by the above-named Act of the United States Congress approved June 21st, It is further understood to, by and 1860. between the parties of this indenture, that in per-

fecting the title or fixing the location of the abovedescribed tract of land, known as Number three (3) of the Grant to the heirs and legal representatives of Don Luis Maria Cabeza de Baca, if other land or lands or land certificates shall be granted by the United States Government in lieu thereof, then, and in that event, the party of the first part hereby bargains, sells, grants and conveys to the parties of the second part, an undivided one-third of one-third of such other land or land certificates as may be received by him, the said David W. Bouldin, in lieu of said lands or any part thereof. It is further understood and agreed by the parties hereto that all necessary expenses incurred in locating all or any part of the above-described land, or in perfecting title, or obtaining other land or land certificates in lieu of said Location Number three (3) shall be borne by the parties hereto in proportion to their several interests."

Defendants Wise Exhibit 19.

Defendants Wise offered in evidence an exemplified copy of the judgment and all proceedings in a certain case in the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima, first entitled John Ireland and Wilbur H. King, plaintiffs, vs. David W. Bouldin, defendant, and later John Ireland and Wilbur H. King, plaintiffs, against Leo Goldschmidt, Administrator of David W. Bouldin, deceased, and also of certain proceedings under the [277] original title thereafter in the Superior Court of the State of Arizona, County of Pima, Counsel stated that said exemplified copy contained a copy of all the papers and proceedings in that case except certain minute entries which are in the minute book in possession of the United States Court.

This exhibit is printed in the appendix.

Mr. Campbell, counsel for the defendants Bouldin, objected to the introduction in evidence of said instrument and to certain parts thereof, as follows:

We object to the judgment part of the record so far as the judgment undertakes to foreclose the attachment, and to order a sale of the property by the sheriff, upon the ground that the Court had no jurisdiction to enter that particular judgment, that the judgment is void because there was no waiver of recourse against other property of the decedent in the complaint, nor by any amendment thereto. And illustrating that, if I may just in a word or two, Mr. Bouldin died while this litigation was pending, Leo Goldschmidt was substituted as a party defendant as administrator, and it is against Leo Goldschmidt as administrator that the judgment was rendered. There are smaller errors in the judgment in that the property is misdescribed. The first course is thirty-six chains, forty-four links, and the other is thirty-six chains and thirty-four links. The notice of sale which is in these papers does not give notice that the sheriff will sell the attached interest but gives notice that he will sell the interest of defendant Goldschmidt, administrator and such interest as Bouldin had at the time of his death. The judgment directed the sale of such interest as Bouldin had at the date of the attachment some two

years previously. The return of the sale shows no valid levy was made under the execution and judgment. [278] It recites a levy upon the interest of Goldschmidt as administrator of the estate of Bouldin only. There is no levy here among these papers. The return of the sheriff shows, however, that he levied upon the interests of Leo Goldschmidt, as the administrator of David W. Bouldin, deceased, and nothing else. It also shows that he sold the interest of Leo Goldschmidt as administrator and nothing else. The return also shows the two courses east in a description of the property which is attempted to be according to the '63 location, and therefore, does not tie it to any place. We object to the papers that are tendered her as proceedings in the Superior Court of Pima County. The petition that is filed in the case is filed in the case of John Ireland and Wilbur H. King vs. David W. Bouldin, long before Bouldin had died and Goldschmidt was the defendant in the action.

Mr. FRANKLIN.—I did not catch that objection. Mr. Campbell.—I say long before they filed their petition the style of the action in which you filed these papers had changed. It was no longer Ireland and King against Bouldin, but it was Ireland and King against Goldschmidt as administrator. The papers are all entitled as the case was when it was first filed in the District Court. We object also to the attempted order made in that case by the Superior Court of Pima County upon the ground that the Court had no jurisdiction, power or authority of any kind to make that or any other order; that it was an

ex parte proceeding upon which service was made upon no one and that the Court was wholly without authority to make the order directing the late sheriff, Nelson to excute a deed. We further object on the grounds that the Court had no power or authority to direct the sheriff of Pima County to convey land in Santa Cruz County, if it otherwise [279] would have had power in the premises. The description of the property as recited in the proceedings in the Superior Court is by reference to another deed—a deed recorded in book 41, at page 597. is an attempted reference to the 1864 deed which was recorded in book 14 at page 597 of the county records. We object further to this—I don't know that it is a valid objection, of course if the 1870 deed conveyed the title from Watts to Hawley, Bouldin had no title in the '63 Location of two-thirds interest. He had conveyed everything he had to his sons long prior to the attachment proceedings, but he had conveyed according to the 1866 amendment, attempted amendment to the '63 Location and this attachment was sought upon the property as of the '63 Location, or '63 description. This is embodied in our objection that the Court had no jurisdiction to render judgment, to render the judgment that was rendered in the case foreclosing the attachment, and we call your attention to paragraph 797.

The COURT.—It may be received subject to the defendants' objection.

Mr. NOBLE.—If the Court please, may it be understood that we make the same objections without restating them?

The COURT.—Yes, and the same ruling.

Defendants Wise Exhibit 20.

Defendants Wise offered in evidence a certified copy of the minute entries of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, in regard to the substitution of Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, as defendant in the suit of John Ireland and Wilbur [280] H. King vs. David W. Bouldin.

Counsel for Bouldins objected to the introduction thereof on the ground that it was immaterial. The same was received in evidence subject to the objection of counsel for Bouldins. This exhibit is printed in the appendix and made a part hereof.

Defendants Wise Exhibit 21.

Defendants Wise offered in evidence exemplified copy of the proceedings in the Probate Court in and for the county of Pima, Territory of Arizona, in the matter of the estate of David W. Bouldin, deceased, showing that the matter of the administration of that estate is still pending before the Superior Court of Pima County, State of Arizona; that Leo Goldschmidt still is administrator, never having been closed up. Mr. Campbell, of counsel for Bouldins, said: "Without making any specific objections to this paper, we add to our other objections something that we did not know before, and that is, that no service was made upon Leo Goldschmidt in this attempted proceeding in the Superior Court; that he was then the administrator, had never been discharged, and that this petition that was filed in the

Superior Court was never served upon Leo Goldschmidt.

The COURT.—The same ruling as before.

Said exhibit is set out in full in the appendix hereto and made a part hereof.

Defendants Wise Exhibit 22.

Defendants Wise offered in evidence an exemplified copy of the Sheriff's Certificate of Sale, under the judgment and order of sale mentioned in Defendant Wise Exhibit 19. For convenience this exhibit is printed in full in the appendix hereto.

This instrument was objected to by defendants Bouldin on the ground of being immaterial, irrelevant and incompetent, and for the further reason that the sheriff's certificate of sale is—that he sold the property of Leo Goldschmidt, administrator, and not the property of Bouldin.

The COURT.—Received subject to objection.

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Defendants Wise Exhibit 23.

Defendants Wise offered in evidence a deed from Lyman W. Wakefield, sheriff of the county of Pima, dated and acknowledged the 16th day of January, 1899, and recorded the 7th of February, 1899, to Wilbur H. King, under the judgment and sale aforesaid. This exhibit is printed in connection with exhibits 19, 20, 21 and 22 in the appendix.

Mr. CAMPBELL.—Said, being admitted to be invalid and void we object to it and object to its going in the record.

Mr. FRANKLIN.—This can be taken subject to the objection because it has reference to it—it con-

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nects up with the next deed.

The COURT.—Very well, it may be received.

Mr. CAMPBELL.—We make some further objections, your Honor; that this deed does not purport to convey anything except such interest as Leo Goldschmidt, the administrator of the Bouldin Estate, had in the property, and recites that only the interest of Leo Goldschmidt was levied upon and that only the interest of Leo Goldschmidt as administrator was sold, and the order of the Court was to sell the interest that he had in March, 1893, and to sell the interest that David W. Bouldin had, and he sells or attempts to sell the interest of the administrator of David W. Bouldin in July, 1895. We further object to this and the other papers on the ground that the Court had no jurisdiction to render any judgment ordering the sheriff to sell the property.

Defendants Wise Exhibit 24.

Defendants Wise offered in evidence an exemplified copy of the record of a deed from Wilbur H. King to Joseph E. Wise dated and acknowledged the 24th day of April, 1907, and recorded [282] May 2, 1907, in Santa Cruz County, Arizona, which deed was admitted in evidence and is in words and figures following, to wit: [283]





